Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In the Supreme Court of the United States

THOMAS JOHN SALZANO
Petitioner,

v.

NORTH JERSEY MEDIA GROUP INC, d/b/a THE RECORD, NORTHJERSEY.COM, MALCOLM BORG, STEPHEN A. BORG, MARTHA MCKAY, and JONATHAN MARKEY
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

Pro se petitioner initiated suit against defendants alleging defamation and related torts after defendants published a March 2, 2006 article (and subsequent articles thereafter) in their newspaper pertaining to a March 1, 2006 electronically filed only adversary proceeding initiated against *pro se* petitioner by a bankruptcy trustee administering a privately owned corporate debtor estate in the Bankruptcy Court-District of New Jersey. The New Jersey Supreme Court reversed the Appellate Division's decision which stripped defendants of any fair report privilege protection. Over the vociferous dissent of three (3) Justices, the three in majority[1] also held the articles were fair and accurate, finding the characterization that *pro se* petitioner "stole" the debtor's funds (despite this never being stated or implied) as being the substantial "gist" of the allegations in the bankruptcy complaint which alleged fraudulent transfer(s) pursuant to Title 11 of the United States Code §544(b), §548(a), §550(a) and §N.J.S.A. 25:2-25(a)., thus dismissing my complaint on fair report privilege grounds. The three questions presented are:

1. If a private individual is able to make a clear and convincing showing of actual malice or common law malice against media defendants, even if the articles complained of are deemed fair and accurate, can that showing defeat media defendants invocation of the fair report privilege?

2. Did the New Jersey Supreme Court err in extending fair report protection to the media when publicly reporting on an initial adversary proceeding electronically filed only,

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[1] The New Jersey Supreme Court's Chief Justice did not participate in this proceeding.

against a private individual by a bankruptcy trustee administering the estate of a privately owned corporate debtor, notwithstanding *pro se* petitioner not being served or placed on basic notice of said proceeding until three (3) days after its publication and when media defendants knew *pro se* petitioner never worked for the debtor and only tenuous link with the debtor was through consanguineous relations?

3. Over the spirited dissent of an equal three Justices, did the New Jersey Supreme Court's three (3) Justices in majority erroneously conclude that the complained of statements in defendants articles were fair and accurate? That is, did the majority erroneously hold that a fraudulent transfer allegation under Title 11 U.S.C. §548(a) in a civil, bankruptcy court jurisdiction equates with media defendants accusation of "stealing"?

DISCLOSURE OF PARTIES (RULE 14.1(b))

The parties to the proceedings below are:

Pro se Petitioner, Thomas J. Salzano;

Defendant(s), North Jersey Media Group Inc., d/b/a THE RECORD, NORTHJERSEY.COM, Malcolm Borg, Stephen A. Borg, Martha McKay, and Jonathan Markey, and Glen Ridge Voice, Inc. and Frank A. Orechio;

Amici curiae, in support of defendants, New Jersey Press Association, ABC, Inc., Advance Publications, Inc., The New York Times Company, NYP Holdings, Inc., Gannett Co., Inc., The Associated Press, Daily News, L.P., Dow Jones & Company, Inc., NBC Universal, Inc., Courthouse News Services, The Reporters Committee for Freedom of the Press, First Media, Alm Media, Inc. (soon to be known as Incisive Media, LLC), Newspapers Association of America, The American Civil Liberties Union of New Jersey, The Association of American Publishers, Inc., WPIX, Inc., and American Society of Newspaper Editors.

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PETITION FOR A WRIT OF CERTIORARI

Pro se petitioner[1], Thomas John Salzano, ("petitioner, me, my, or I") respectfully petitions for a writ of certiorari to review the judgment of the New Jersey Supreme Court in this case.

OPINIONS BELOW

The opinion of the New Jersey Supreme Court is reported at 201 N.J. 500 (2010) and is reproduced in the annexed appendix ("App.") at App. 1a-46a. The partial dissent of Justices' Hoens, Rivera-Soto and LaVecchia is reproduced at App. 47a-59a. The opinion of the New Jersey Appellate Division is reported at 403 N.J. Super. 403 (2008) and is reproduced at App. 60a-88a. The oral opinion of the trial court is not officially reported but is reproduced at App. 89a-101a. *Pro se* petitioner's Motion for Reconsideration to the New Jersey Supreme Court was denied and entered on July 19, 2010. Said Order is reproduced at App. 102a.

JURISDICTION

The judgment of the New Jersey Supreme Court sought to be reviewed was entered on May 11, 2010. *Pro se* petitioner timely filed a motion for reconsideration which was denied and entered on July 19, 2010. The jurisdiction of this Court is invoked

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[1] *Pro se* petitioner is twenty eight years old and not an attorney at law. Further, I received no legal advice or assistance in formulating the instant writ and all case law, statutes, and or citations herein were researched solely by me. Therefore, I respectfully ask this High Court to review my petition for certiorari broadly and liberally.

under 28 U.S.C. §1254(1). This petition is timely pursuant to Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL AND STATUTORY PROVISION(S) INVOLVED

Amendment I: Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances

Restatement (Second) of Torts §611 comment a, b and e (1977): (Full text of comments, see App. 103a)

Title 11 of the United States Code §548(a), §544(b), §550(a): (Full text of Statutes, see App. 104a)

STATEMENT OF THE CASE

The instant petition seeks this Court's involvement in conclusively resolving exceptionally important aspects of the fair report privilege which governs the media's right to report the defamatory content of certain public/judicial proceedings or official actions. These questions have not been, but should be settled by this Court. For years, the lower courts have wrestled with the questions presented, producing widespread conflicting decisions among the highest state and federal courts alike. The court below is the latest to add to this spectrum of disparity. Moreover, it is in the overall interest of every citizen of this nation as well as the press to have these issues uniformly determined which only this Court can do. Because the questions presented in this case are critically important, the disparity in results in the

lower courts are long recurring and will continue to do so, producing even greater inconsistency on the issues, and because the New Jersey Supreme Court's decision is antithetical to this Court's teachings, conflicts with bedrock bankruptcy law and is clearly erroneous, resolution of these questions are warranted.

1. *Overview: The Fair Report Privilege*

The fair report privilege "emerged as a safety valve to the common-law rule that a republisher of a defamatory statement was subject to the same liability as the original defamer." *Howell v. Enterprise Publishing Co., LLC*, 920 N.E. 2d 1, 13 (Mass., 2010); *Medico v. Time, Inc.*, 643 F. 2d 134, 137 (3d Cir.), cert denied, 454 U.S. 836 (1981); 1 R.D. Sack, Defamation Section 7.3.2.2.1, at 7-16 (3d ed. 2009). Said privilege established a qualified safe harbor for the press and "protects the publication of defamatory matters that appear in a report of an official action or proceeding, or of a meeting open to the public that deals with a matter of public concern." App. 15a-16a. It "[r]eflects the judgment that the need, in a self-governing society, for free-flowing information about matters of public interest outweighs concerns over the uncompensated injury to the person's reputation." App. 16a.

Three policies have been cited by courts that support the fair report privilege:

> "(1) the agency rationale, by which the reporter acts as agent for an otherwise preoccupied public which could, if it possessed the time, energy or inclination,

> attend the proceeding; (2) the public supervision rationale, by which the reporter provides to the larger community data it needs to monitor government institutions; (3) or the public information rationale, by which the reporter provides information affecting the greater public welfare."

Reuber v. Food Chemical News, Inc. 925 F.2d 703, 713 (4th Cir.1991) *en banc*, cert. denied, 501 U.S. 1212 (1991); *Medico*, 643 F.2d at 140-142.

It is well established that in order for the privilege to apply, however, the publication must be a "full, fair and accurate" recounting of the defamatory report. App. 31a citing *Costello v. Ocean County Observer*, 136 N.J. 594, 607 (1994); See also *Trainor v. The Standard Times*, 924 A.2d 766, 770 (R.I., 2007); *Moreno v. Crookston Times Printing Co.*, 610 N.W. 2d 321, 330-31 (Minn., 2000). "It is not necessary that [the account] be exact in every immaterial detail...It is enough that it conveys to the persons who read it a substantially correct account of the [contents of the official document]." *Costello*, 136 N.J. at 607. "The fairness question is whether the reporter's editorial decisions- such as characterizations, juxtapositions, and choice of focus-would give a reader an erroneous impression about the character of what happened." *Howell*, 920 N.E. 2d at 21. Courts have made it explicitly clear that:

> "[n]ot only must the report be accurate, but it must be fair. Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the

> proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it."

Schiavone Const. Co. v. Time, Inc., 847 F.2d 1069, 1087-88 (3d Cir. 1988) citing Restatement (Second) of Torts §611 comment f (1977). Likewise, reports are unfair and inaccurate where "garbled or fragmentary to the point where a false imputation is made about the plaintiff which would not be present had a full and accurate report been made." *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736, 739 (D.C.Cir.1985), cert denied, 476 U.S. 1141 (1986).

Courts also agree that "a statement is considered a fair report if its 'gist' or 'sting' is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced." *Yohe v. Nugent*, 321 F.3d 35, 43 (1st Cir., 2003); *Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1436 (9th Cir. 1992); *Williams v. WCAU-TV*, 555 F. Supp. 198, 202 (E.D.Pa.1983); *Kilgore v. Younger*, 180 Cal Rptr. 657, 661 (1982); *Orr v. Argus-Press Co.*, 586 F.2d 1108, 1112-13 (6th Cir. 1978); See also *Remick v. Manfredy*, 238 F. 3d 248, 261 (3d Cir. 2001); *Freedom Communications, Inc. v. Coronado*, 296 S.W.3d 790, 798 (Tex. App., 2009) (whether publication is substantially correct, we consider whether the statement was more damaging to the plaintiff's reputation in the mind of the average reader.) Thus, so long as the media fairly and accurately reports certain judicial documents or

official reports even though the statements themselves may in the end prove to be false, the protection of the privilege is not forfeited.

2. *The Norvergence Bankruptcy & Adversary Proceeding 06-01403*

On June 30, 2004, an involuntary bankruptcy petition was filed against Norvergence, Inc., ("debtor"), a privately owned telecommunications firm, Case No. 04-32079, under Title 11, Chapter 11 of the United States Code ("11 U.S.C.") in the United States Bankruptcy Court-District of New Jersey. Shortly thereafter the case converted to a Chapter 7 liquidation proceeding. 11 U.S.C. § 1112(b). App. 4a. I was never employed by the debtor and the only tenuous link between me and the debtor was through familial relations in that my father was a managing consultant employed by the debtor and my uncle served as debtor's chief executive officer. App. 5a. I had no fundamental knowledge of the debtor's actual services, business plan, finances or general operational scheme except that the debtor provided telecommunication services. I also never spoke out about or thrusted myself into any of the debtor's bankruptcy proceedings. In fact, I was a full time undergraduate student at New York University during this time.

On March 1, 2006, I became unwittingly embroiled as a defendant in said bankruptcy when Adversary Proceeding 06-01403[2] ("AP 06-01403") was

[2] To further compound the matter, much of the content of AP 06-01403 was not grounded on any pre-investigatory supporting evidence but rather erroneously filed. The allegations regarding my use of the debtor's corporate American Express card and

electronically filed against me on the PACER Service website commenced by the appointed bankruptcy trustee to the debtor's estate by and through his special litigation counsel. AP 06-01403 was a nine (9) page complaint to avoid and recover alleged fraudulent transfers pursuant to 11 U.S.C. §544(b), §548(a) and §550(a) and N.J.S.A. §25:2-25(a) *et seq.* and for the imposition of a constructive trust. App. 5a. AP 06-01403 alleged that *pro se* petitioner:

> "[u]nlawfully diverted, converted and misappropriated [NorVergence]'s funds for his own personal benefit, and to the detriment of [NorVergence], by, *inter alia*, (i) applying two NorVergence checks, one in the amount of $61,200.00 dated July 1, 2003, and the other in the amount of $140,000.00 dated July 29, 2003, toward the purchase of his personal residence...and (ii) by charging personal expenses, such as outings to bars and clubs, clothing and other

---

other credit cards in undisclosed amounts were factually baseless and were **voluntarily dismissed** by this trustee. The bankruptcy court entered an Order to this effect dated April 8, 2009. (U.S. Bankruptcy Court-NJ, AP 06-01403 Pacer Docket No. 73). The allegations concerning funds used for the down payment of my *family's residence* were also premature. Said monies constituted a contracted portion of my father's compensation which translated into familial support for his ex-wife and minor children. I neither had dealings with nor knew about these check transactions which were negotiated directly by my father. Regardless, I mounted a full defense evidencing the debtor's solvency at the time of these transactions via certified financial statements and reasonably equivalent value given to the debtor by my father in exchange for said monies.

personal expenses, between November 25, 2002 and March 24, 2004, to [NorVergence]'s American Express Business Gold/Platinum totaling $268,795.84, as well as utilizing other corporate credit cards in undisclosed amounts

****

"Upon further information and belief, the Defendant is the son of [the] former Chief Managing Officer of NorVergence. The Defendant was never an employee of the Debtor."

****

"The Debtor, with the actual intent to hinder, delay or defraud creditors of the Debtor, conveyed the Misappropriated Funds from its corporate checking account to the Defendant for the purpose of providing the Defendant with funds to be used toward the purchase of the Property, and for other personal expenses (the "Conveyances")"

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"In accordance with the provisions of 11 U.S.C. §550(a), the Trustee is entitled to immediately recover from the Defendant an amount equal to the Conveyances. WHEREFORE, the Trustee demands judgment against the Defendant: (a)

> avoiding the Transfers pursuant to 11 U.S.C. §548(a); (b) awarding the Trustee judgment in an amount equal to the Transfers and directing the Defendant to immediately pay the Trustee an amount equal to the Conveyance pursuant to 11 U.S.C. §550(a), together with interest on such amount from the date of the Transfer..."
>
> **********
>
> "The Debtor made the Conveyances with the actual intent to hinder, delay or defraud creditors of the Debtor."
>
> **********
>
> "Upon information and belief, Defendant has listed the Property for sale. As a result of Defendant's unlawful misappropriation of the Debtor's funds, and fraudulent transfer and unjust enrichment as alleged hereinabove, the Property belongs to the Trustee. The Court should impose a constructive trust and/or equitable lien to prevent unjust enrichment to the Defendant[3]..."

On March 2, 2006, less than a day after AP 06-01403's electronic filing over the PACER Service website, and three (3) days before I was given actual notice and service of the complaint, North Jersey Media Group *et. els.* ("NJMG or defendants") published an article in its newspaper, *The Record*,

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[3] Refer to footnote 1.

pertaining to AP 06-01403 entitled **"Man accused of stealing $500,000 for high living,"** with the subheading **"Norvergence funds were taken."** The March 2, 2006 article as it appeared in the *Record* is reproduced verbatim in the decision of the New Jersey Supreme Court. App. 6a-9a. Said report was posted on defendants' website NorthJersey.com, with the same headline but without the subheading. On March 9, 2006, the report was republished in my local town paper, the *Glen Ridge Voice*, under the headline, "Argyle residence allegedly bought with stolen funds." App.9a. It was also posted on the website of LeasingNews.org under the headline, "NorVergence BK charges Salzano son stealing $1/2 MM." See *Id.*

3. *The Proceedings and Decisions Below.*

On February 20, 2007, I filed a complaint alleging defamation, gross negligence, false light invasion, invasion of privacy-public disclosure of private facts, malice[4], negligent and intentional infliction of emotional distress against NJMG, which publishes *The Record*, and numerous other defendants associated with *the Record* (collectively "defendants"). I alleged the following statements were false and defamatory:

1. The headline in *The Record* and on NorthJersey.com: "Man accused of stealing $500,000 for high living";

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[4] The meaning of malice intended was common law malice, i.e. spite and ill-will and not the heightened standard of actual malice. This was clarified on the record to all of the courts below.

2. The subheading in *The Record*: "NorVergence funds were taken";

3. The headline in *Glen Ridge Voice*: "Argyle residence allegedly bought with stolen funds";

4. The headline on LeasingNews.org: "NorVergence BK charges Salzano son stealing $1/2 MM";

5. From the text of all of the reports: "The son of the mastermind behind NorVergence . . . allegedly stole close to $500,000 from the company according to court papers ...";

6. From the text of all of the reports: "Thomas John Salzano and his father started a Kenilworth business last year called Charity Snack, which also went belly-up."

7. From the text of all the reports: "In addition, the papers claim that because of his 'unlawful misappropriation of [NorVergence's] funds, and fraudulent transfer and unjust enrichment' the house...belongs to the trustee[5]."

App.9a-10a. I alleged the statements were defamatory per se in that the use of the words "stealing," "stolen funds," and "taken" imputed criminal conduct to me and that the trustees assertions were baseless and unsupported. App.10a. I alleged NJMG failed to "perform any due diligence or inquiry into the true

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[5] I alerted The New Jersey Supreme Court that its decision omitted this statement complained of as being false and defamatory and conveying an erroneous impression to the public by editing it out of context and altering its intended meaning.

nature of the adversarial complaint" and failed to "conduct a fair reading [of the complaint], by which a reasonable person would have determined" that the trustee neither alleged nor implied "'stealing' of any kind," App. 11a, and defendants unfair, inaccurate and grossly distorted recitations transformed civil bankruptcy allegations in a remote adversary proceeding of no legitimate public concern into what would be understood by a person of ordinary intelligence as criminal wrongdoing. I alleged invasion of privacy (public disclosure of private facts) in connection with the report's multiple revelations to the public of my exact personal home address three (3) distinct times, a private citizen in no way connected to the public and only unwittingly dragged into the debtor's bankruptcy placing my mother, minor sisters and I[6] at direct risk of retaliation from "disgruntled ex-NorVergence employees and/or former customers." I sought presumed, consequential, compensatory, and punitive damages, as well as costs, along with a retraction. App. 11a.

Defendants filed a motion to dismiss my complaint pursuant to New Jersey Rule 4:6-2(e) for failure to state a claim upon which relief may be granted citing the fair report privilege. The motion was granted with prejudice[7] as to all of the defendants.

On appeal, a unanimous Appellate Division panel reversed and reinstated all of my claims and remanded the case. However, the panel reversed the

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[6] My parents are divorced and my father never resided at my home address.
[7] I was never afforded an opportunity to amend or expand on the facts alleged in my complaint.

Order not because it deemed the statements complained of as unfair and inaccurate, App. 76a-77a, but rather because of an exception to the fair report privilege recognized by many states known as the "initial pleading exception" which places reports of initially filed pleadings or complaints outside the scope of the privilege's protection. App. 67a; 77a-81a. The panel also held "although a private person, [petitioner] was embroiled in a public matter and must be held to the actual malice standard, but we also hold that he should be permitted to amend his complaint." App. 61a; 81a-85a

Defendants filed a petition for certification to the New Jersey Supreme Court on the issue of whether there is an initial pleading exception to the fair report privilege. I filed a cross-petition for certification seeking review of the determination that said articles were fair and accurate and the determination that I would have to prove actual malice instead of negligence in order to recover damages. Importantly, I emphasized on the record to the New Jersey Supreme Court, as was done at the Appellate Division, that if I was held under the actual malice standard, I was able to particularize clear and convincing facts in an amended pleading which would infer the existence of actual malice by defendants and defeat the privilege. The New Jersey Supreme Court granted both petition and cross-petition for certification, and granted nineteen (19) interveners amicus standing.

The New Jersey Supreme Court reversed the appellate panel's holding insofar as the initial pleading exception to the fair report privilege. App. 30a-31a. Although the Court specifically noted that

the Restatement (Second) of Torts §611 comment e states: "[t]he publication . . . of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the rule stated in this Section," App. 21a, it rejected the Restatements approach. Acknowledging the sharp divide from jurisdiction to jurisdiction to have ruled on the issue, the Court believed there to be "a clear trend away from recognizing the initial pleading exception." App. 23a. The Court reasoned that eliminating the privilege from initial pleadings would run contrary to "the public information and supervisory rationales" of the fair report privilege since the complaint is open to public view.[8] App. 28a.

However, the Court was deeply and equally divided three (3) to three (3) on whether the instant articles were fair and accurate. Because the Appellate Division concluded they were, the three majority Justices' decision carried the day on the split, upholding the lower courts finding. That is, the majority equated "stealing" with civil allegations made in the *context* of a bankruptcy avoidance action which alleged fraudulent transfers under 11 U.S.C. §548, §544 & §550 and a constructive trust. Despite conceding that the headline "Norvergence funds were taken, was imprecise," App. 33a, "[t]he report and headline used the words 'stolen' and 'stealing,' which were not used in the complaint," App.34a, and observing as the Appellate Division did that, "a finer

[8] This, in and of itself is a highly suspect finding because AP 06-01403 was only electronically filed over the U.S. PACER Service and was not 'open to public view' at the time of its filing because it would only be accessible to subscribers to that service with a login account and password.

point can be put" on the trustee's allegations, App. 35a, the majority did not find these statements to be unfair and inaccurate compared to the bankruptcy complaint. App. 35a-36a.

This radical holding sparked a vociferous, joint dissent by an equal three Justices of the Court. In stark disagreement, the dissent concluded that "[t]his news story has all of the elements that cry out for this Court to pull aside the cloak of privilege, for it misleads by innuendo, insinuates criminal prosecutions are afoot, and implies distortion. It does not qualify as a news report that is full, fair and accurate." App. 59a.

Notwithstanding (1) the sharp divide on the issue of fairness and accuracy, (2) my argument that a showing of actual malice would trump defendants invocation of the fair report privilege as a defense, regardless of "fairness and accuracy" and (3) my ability to particularize facts to the Court clearly demonstrating an issue for the jury with regards to the existence of actual malice, the Court denied me the opportunity to go forward based on the theory that statements made with actual malice will forfeit the availability of the fair report privilege. App. 44a. Instead, the Court instituted a "hybrid" privilege which elevates the qualified fair report privilege to an absolute, indefeasible privilege once found to be fair and accurate, regardless of the existence of actual malice: "[t]he publisher's failure to do what is necessary to make the report full, fair and accurate is the **only** relevant inquiry... Indeed, it is that failure that satisfies the fault standard imposed by the United States Supreme Court in *Gertz*." App. 41a. The

Court deemed what it considered the "modern trend" as acceptable: "'[a]s long as the report is fair and accurate, 'both the publication's truth and the publisher's knowledge of its truth or motivation for publishing it are irrelevant.'" App. 41a. The Court cited the Restatement (Second) of Torts §611 comments a and b as authority that "'the accurate reporting of judicial proceedings results in complete immunity,' regardless of the knowledge or motive of the publisher." App. 41a.

The Court did find an arguably defamatory meaning in statement 6 *infra* which was not subject to the fair report privilege and allowed that aspect of my defamation complaint to go forward along with my subsidiary claims which were not considered. (See p. 11, *infra*).

On motion for reconsideration, I argued that the Court should allow the issue of fairness and accuracy to go to a jury for resolution because of the Court's equal split. The Court's disparate conclusions drawn from the articles infer that a jury may do so as well and therefore the issue was ripe for adjudication by the finder of fact and not as an issue of law. I cited several jurisdictions which follow this approach. Said motion was denied by the Court over two (2) Justices vote to reconsider. It is under this backdrop in which the present petition for certiorari comes before this Court for review.

REASONS FOR GRANTING CERTIORARI

I. THERE IS A DEEP, DIRECT AND MATURE CONFLICT IN THE LOWER COURTS OVER THE SCOPE OF THE FAIR REPORT PRIVILEGE

A. Overwhelmingly, Courts Are Nationally Divided As To Whether Or Not The Fair Report Privilege Is An Absolute Privilege Or A Qualified/ Conditional Privilege Which May Be Defeated By A Showing Of Common Law Or Actual Malice.

Whether the fair report privilege extends an absolute privilege to the media in reporting on defamatory content in official proceedings or judicial documents or rather only a conditional/qualified privilege has been the subject of much debate in the courts. See *Reuber,* 925 F.2d at 714; *White v. Fraternal Order of Police*, 909 F.2d 512, 528 (C.A.D.C., 1990); *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 272-273 (7th Cir., 1983); *Medico,* 643 F. 2d at 143-45. At least twenty four (24) of the highest state courts, a multitude of state appellate courts as well as the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Ninth circuit courts of appeal have considered and chimed in on the issue.

Some courts have recognized the privilege as an absolute privilege in which neither actual malice nor common law malice can defeat said privilege See *Whiteside v. Russellville Newspapers, Inc.*, 295 S.W.3d 798, 806 (Ark., 2009); *Solaia Technology v. Specialty Pub. Co.*, 852 N.E.2d 825, 843 (Ill. 2006); *Finke v. Walt Disney Co.*, 2 Cal.Rptr.3d 436, 453 (Cal. App.,

2003) (by statute); *Moreno,* supra, 610 N.W.2d at 333; *Sahara Gaming v. Culinary Workers Union*, 984 P.2d 164, 165 (Nev. 1999); *Butcher v. SEM Newspapers, Inc.*, 475 N.W. 2d. 380, 382 (Mich. Ct. App.), appeal denied, 478 N.W.2d 169 (Mich. 1991); *Furgason v. Clausen*, 785 P.2d 242, 245 (N.M. App., 1989) (appeal denied); *Read v. News-Journal Co.*, 474 A.2d 119, 120 (Del. 1984); *Shafer v. Lamar Pub. Co., Inc.*, 621 S.W.2d 709, 713 (Mo.App.W.D., 1981); *Holy Spirit Ass'n for Unification of World Christianity v. New York Times Co.*, 424 N.Y.S.2d 165, 167 (1979) (by statute). The New Jersey Supreme Court is the latest state to adopt this view.

Conversely, a host of other courts have established that the fair report privilege is truly a conditional/qualified privilege and is lost upon a showing of actual malice or abuse of said privilege i.e. for the sole purpose of defaming and injuring the individual. See *Howell,* 920 N.E.2d at f.n. 8; *Jews for Jesus, Inc. v. Rapp,* 997 So.2d 1098, 1111-12 (Fla.,2008); *Thomas v. Telegraph Pub. Co.*, 929 A.2d 993, 1008 (N.H., 2007); *Lewis v. Newschannel 5 Network, L.P.*, 238 S.W.3d 270, 284 (Tenn. App., 2007)(appeal denied); *Oparaugo v. Watts*, 884 A.2d 63, 81 (D.C.2005); *Yohe,* 321 F. 3d at 44; *Amway Corp. v. Procter & Gamble Co.*, 346 F. 3d 180, 186 (6th Cir., 2003) (not absolute); *Kauzlarich v. Yarbrough*, 20 P.3d 946, 951-52 (Wash.App., 2001); *DeMary v. Latrobe Printing and Pub. Co.*, 762 A.2d 758, 764 (Pa.Super. Ct. 2000), appeal denied, 567 Pa. 725, 786 A.2d 988 (2001); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex, 1995); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1098 (4th Cir., 1993); *Wright v. Grove Sun Newspaper Co., Inc.*, 873 P.2d

983, f.n. 1 (Okla. 1994); *Casteel v. News-Record, Inc.*, 875 P.2d, 21, 25 (Wyo. 1994); *Stem v. Gannett Satellite Information Network, Inc.*, 866 F. Supp. 355, 360 (W.D. Tenn.1994); *Russell v. Thomson Newspaper, Inc.*, 842 P.2d 896, 904-905 (Utah, 1992); *Doe v. Doe*, 941 F.2d 280, 292 (5th Cir. 1991); *WKRG-TV, Inc. v Wiley*, 495 So.2d 617, 620 (Ala., 1986); *Lanvin v. New York News Inc.*, 757 F. 2d 1416, 1421 (3d Cir. 1985); *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884, 894 (Iowa, 1989); *Janklow v. Viking Press*, 378 N.W.2d 875, 879 (S.D., 1986); *The Gazette, Inc. v. Harris*, 229 Va. 1, 18 (1985), cert denied, 472 U.S. 1032 (1985); *Schiavone Construction Co. v. Time, Inc.*, 735 F.2d 94 (3d Cir.1984); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 78 (W.Va. 1983); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 535 (7th Cir. 1982); *Goodrich v. Waterbury Republican-American, Inc.*, 448 A. 2d 1317, 1325 (Conn.,1982); *Padgett v. Sun News*, 292 S.E.2d 30, 34 (S.C., 1982); *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 70 (2d Cir. 1980); *Gobin v. Globe Pub. Co.*, 531 P.2d 76, 80 (Kan., 1975); *Koren v. Capital-Gazette Newspapers*, 22 Md.App. 576, 581 appeal denied, 273 Md. 721 (1974); *Denton Publishing Co. v. Boyd*, 460 S.W.2d 881, 883-884 (Tex. 1970); *American District Telegraph Co. v. Brink's Incorporated*, 380 F.2d 131, 133 (7th Cir., 1967); *Fairbanks Pub. Co. v. Francisco*, 390 P.2d 784, 796 (Alaska, 1964); *Sciandra v. Lynett*, 187 A.2d 586, 588-89 (Pa. 1963); *Borg v. Boas*, 231 F.2d 788, 794-95 (9th Cir., 1956); *Paducah Newspapers, Inc. v. Bratcher*, 274 Ky. 220, 221 (1938).

It is readily apparent that the state of doctrine in this area is no longer embryonic and any further development by the lower courts is unwarranted, only

adding more confusion and disparity to the issue. Further, to allow one to overcome the privilege through a showing of actual or common law malice should not depend on the State one lives in. Jurisdictions which have taken the element of actual malice or common law malice out of the fair report privilege's calculus under a public's need to know rationale and insulate the media from liability even when recklessly reporting what they know or subjectively believe to be false from a report- so long as they do so fairly and accurately- is a startling proposition to any citizen of this nation and makes legal tender of falsehood and gives dignity to mendacity. The courts which adopt this view fail to strike the proper balance of preserving individual reputation with freedom of speech and the press, transforming what was once denominated a "privilege" for the media and others into an echelon of unprotected speech supremacy which improperly supplants,

> "'[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt [which] reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty...[which] right is [not] entitled to any less recognition by this Court as a basic of our constitutional system.'"

Gertz v. Robert Welch, Inc. 418 U.S. 323, 341 (1974) quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (concurring opinion); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990). Thus, this Court must reiterate

the legitimate and compelling interest in "compensating private individuals for wrongful injury to reputation." *Gertz,* 418 U.S. at 348.

Additionally, the New Jersey Supreme Court's reliance on the Restatement (Second) of Torts §611 comments a and b is constitutionally infirm as said comments contravene well established principles by this Court. See *Herbert v. Lando*, 441 U.S. 153, 171 (1979) ("[s]preading false information in and of itself carries no First Amendment credentials."); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (plurality) ("[c]alculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech'"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas..." and should be penalized under defamation law when the "statement was made with knowledge that it was false or with reckless disregard of whether it was false or not."). Thus, "[i]f someone knows that the news story is false, he can't sanitize his republication by purporting to rely on the news source. Nor can he claim immunity if he has conflicting information from another source and recklessly disregards it." *Flowers v. Carville*, 310 F.3d 1118, 1130 (9th Cir., 2002); See also *Ryan v. Brooks*, 634 F.2d 726, 733 (4th Cir. 1980) ("there is also no social value... in the knowing publication of false information, and no danger that attaching liability for such publications will cause the press to steer so far from the danger zone that free expression will be stifled"). This Court must clarify that the Restatement (Second) of Torts §611 comments a and b

cannot be used to displace the constitutional standards governing actual malice.

Altogether, to confer anything more than a conditional privilege upon the press under the rubric of "fair report" is unwarranted and unconstitutional. There is also no overarching or legitimate public policy in permitting impunity to those who publish information with the knowledge it is false or with reckless disregard of the truth and with the intent to harm. Since this case is an ideal vehicle for providing uniformity and resolution to the lower courts on this important and recurring question, the instant writ should be granted.

B. Courts Are Nationally Divided As To Whether Or Not the Fair Report Privilege Extends Protection to Initially Filed Civil Complaints or Pleadings Against Private Individuals

The decision below is the latest which adds to over a century of myriad, disparate decisions reached by state courts of final jurisdiction and circuit courts of appeal regarding the issue of whether initial civil pleadings against private individuals fall under the protections afforded by the fair report privilege. Numerous federal and state courts have found the privilege inapplicable to initial pleadings/complaints. See *Howell,* 920 N.E. at f.n. 11 citing *Cowley,* 137 Mass. 392 (1884); *Quigley v. Rosenthal,* 327 F.3d 1044, 1061 (10th Cir. 2003) cert denied, 540 U.S. 1229 (2004) (applying Colorado law); *Moreno,* 610 N.W.2d at 329 citing *Nixon v. Dispatch Printing Co.,* 112 N.W. 258, 259 (Minn. 1907); *Russell v. Thomson Newspapers, Inc.* 842 P.2d at 901; *Sanford v. Boston*

Herald-Traveler Corp., 61 N.E.2d 5, 6 (Mass., 1945); *McCurdy v. Hughes*, 63 N.D. 435, 437 (1933); *Mannix v. Portland Telegram*, 144 Or. 172 (1933); *Fitch v. Daily News Publishing Co.*, 217 N.W. 947 (Nebr. 1928); *Murphy v. Maui Publishing Co.*, 23 Haw. 804, 810-11 (1917); *Parsons v. Age-Herald Pub. Co.*, 181 Ala. 439 (1913); *Flues v. New Nonpareil Co.*, 135 N.W. 1083, 1085-86 (Iowa 1912); *Williams v. Black*, 24 S.D. 501, 510 (S.D.1910); *Brown v. Globe Printing Co.*, 213 Mo. 611 (1908); *A.H. Belo & Co. v. Lacy*, 111 S.W. 215, 218 (Tex. Civ. App. 1908); *Ilsley v. Sentinel Co.*, 113 N.W. 425, 427 (Wis. 1907).

Conversely, others grant media fair report protection for reporting judicial documents including pleadings. *Weber v. Lancaster Newspapers, Inc.*, 878 A.2d 63, 72 (Pa.Super.Ct. 2005), appeal denied 916 A.2d 634 (2007); *Solaia*, 852 N.E.2d at 844; *Amway Corp.*, 346 F.3d at 187-88; *Sahara Gaming Corp.*, 984 P.2d at 168; *Hoeflicker v. Higginsville*, 818 S.W.2d 650, 651-52 (Mo. Ct. App. 1991);*Cox v. Lee Enterprises, Inc.* 723 P.2d 238, 240 (Mont. 1986); *Johnson Publishing Co.*, 271 A.2d 696, 698 (D.C.App. 1970); *Langford v. Vanderbilt University*, 287 S.W.2d 32, 37 (Tenn, 1956); *Paducah Newspaper, Inc.*, 118 S.W.2d 178 (Ky, 1938); *Campbell v. New York Evening Post*, 245 N.Y. 320 (1927). But even the courts that have ruled so garnered critical dissent. See *Solaia* at 851-856.

Although the press possesses broad authority under the First Amendment to report on judicial proceedings and may do so under the fair report privilege, this privilege must be exercised consistently with the constitutional safeguards to those potentially defamed private citizens. To permit the press to

report electronically filed bankruptcy avoidance actions straight from an online court's docket under privilege also raises serious procedural due process concerns inherently fundamental to all citizens under the Fifth and Fourteenth Amendments. See generally, *Mullane v. Central Hanover Bank Trust Co.*, 339 U.S. 306, 314 (1950); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'"). Unlike what is stated in "open court" in which parties presumably have been placed on actual notice of the proceeding and are familiar with the underlying allegations, no such presumption is warranted with regards to an initial electronically filed only complaint. Indeed, in the instant case this did not happen, as I was not served A.P. 06-01403 until three days after the publication of said articles.

Worse, the instant disclosure, overly embellished and unfairly recited highly technical, easily misunderstood allegations averred in AP 06-01403 against a private citizen which does not encompass speech informative to the public and throws no light upon the administration of justice. It is not information "needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Nor do bankruptcy allegations against a private citizen underscore the vitality and scope of the "profound national commitment to the principle that debate on *public issues* [which] should be uninhibited, robust, and wide-open." *New York Times Co. v.*

Sullivan, 376 U.S. 254, 270 (1964). If anything, the instant reports only confused and mislead the general public, and in fact the trial judge. App. 101a-102a. This Court should address these concerns which have the capability of recurring every day in every state. Because the marginal utility of waiting for any additional courts to rule on this issue is thoroughly outweighed by the unfairness to litigants in failing to resolve the questions presented, certiorari is warranted.

II. THE DECISION BELOW IS ANTITHETICAL TO DECISIONS FROM THIS COURT'S ACTUAL MALICE JURISPRUDENCE AS WELL AS THIS COURT'S RECOGNITION THAT THE PRESS ONLY ENJOYS A CONDITIONAL PRIVILIGE IN REPORTING DEFAMATORY REPORTS

"There are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984). One such category encompasses published defamatory statements made with actual malice, that is, statements that are known to be false but published anyway or made with reckless disregard of the truth, and there is a long line of authority from this Court espousing this fundamental concept. See *Lando*, 441 U.S. at 171; *Hustler Magazine v. Falwell*, 485 U.S. at 52; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968); *Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967); *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 63 (1966). There is no reason to believe that this principle be treated any differently under the fair

report privilege and divest defamed plaintiffs the ability to overcome said privilege by a showing of malice. In fact, decisions from this Court suggest the contrary.

In the landmark case *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court announced a *conditional* constitutional standard intended to free criticism of *public officials* from the restraints imposed by the common law of defamation. The Court prohibited recovery by a public official for defamatory falsehood relating to his official conduct "unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id* at 279-280.

Pointedly, Justices' Goldberg and Douglas' concurrence acutely acknowledged that the Court ruled "the Constitution gives citizens and newspapers a *'conditional privilege'* immunizing *non-malicious* misstatements of fact regarding *the official conduct of a government officer*." *Id* at 289. This Court cited with approval *Lawrence v. Fox*, 357 Mich. 134, 136 (1959) for the proposition that "[t]he showing of malice required for the forfeiture of the privilege is not presumed but is a matter for proof by the plaintiff." *Id* at 284. Thus, "[i]n *New York Times, Inc.*, the Court held that the First Amendment shields all who speak in *good faith* from the threat of unrestrained libel judgments for *unintentionally* false criticism [of a public official]." *Dun Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 776 (1985) (Justice Brennan dissenting).

In *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), this Court invalidated a Louisiana statute that directs criminal punishment for true statements made with malice that openly criticize the official conduct of public officials. The Court declared:

> "The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published...should enjoy a like immunity...'Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. * * *' Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

Id at 75 citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) the Court again confirmed that knowing lies are excluded from the limited First Amendment protection *New York Times* established for innocently uttered false statements of fact. This Court cogently reiterated:

> "There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."

Id at 340. Although this Court stressed the need to avoid self-censorship by the news media, the Court explained this was not the only societal interest at stake:

> "[i]f it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation...Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation."

Id at 341 (internal citations omitted).

In *Herbert v. Lando*, 441 U.S. 153 (1979), the petitioner launched a diversity action in federal district court for defamation. Held under the actual malice standard, petitioner sought an order to compel answers to questions into the state of mind of those who edit, produce and publish. However, respondents refused on First Amendment grounds. The Court of Appeals agreed, concluding the privilege not to answer was absolute. This Court reversed, observing:

> "[c]ourts have traditionally admitted any direct or indirect evidence relevant to the

> state of mind of the defendant and *necessary to defeat a conditional privilege* or enhance damages. The rules are applicable to the press and to other defendants alike."

Lando, 441 U.S. 162-165. This Court explained that extending "[a]n absolute privilege to the editorial process of a media defendant in a libel case is not required, authorized, or presaged by this Court's prior cases and would substantially enhance the burden of proving actual malice, contrary to the expectations of *New York Times*, *Butts*, and similar cases." *Id* at 169. The Court further opined:

> "Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, **the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation**...If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more that what our cases contemplate and does not abridge either freedom of speech or of the press... **Only knowing or reckless error will be discouraged; and unless there is to be an absolute First Amendment privilege to inflict injury by knowing or reckless conduct...constitutional values will not be threatened.**"

Lando, 441 U.S. 171-173 citing *Gertz*, 418 U.S. at 340. See also *Id* at 176 ("[i]ntent, motive, and malice were not necessarily involved except to counter *qualified* privilege or to prove exemplary damages.").

If not dispositive, these cases are instructive. They demonstrate compelling evidence that imply the fair report privilege should only command protection as a conditional privilege and will always be defeated by a showing of actual malice. Further, these holdings presumptively apply with equal force to those invoking the protection of the fair report privilege and States adoption of the Restatement (Second) of Torts §611 comments a and b cannot divest the constitutional directives of this Court. Therefore, a publishers' knowledge of falsity or reckless disregard of the truth should always remain a viable challenge by a plaintiff to forfeit defendants fair report privilege, regardless of the defamatory reports alleged "accuracy." Certiorari is warranted in order to uniformly apply this principle in every State.

III. THE DECISION BELOW WAS CLEARLY ERRONEOUS AND DESERVES THIS COURT'S REVIEW

A. The Determination that Said Articles Were Fair and Accurate Was Clear Error

Over the spirited dissent of an equal three justices, the majority below expanded the common law privilege of fair reporting beyond conceivable bounds and contrary to its purpose. Although the majority correctly observed the privileges legal requirements, (See pgs. 3-6 *infra*) it failed to faithfully apply said principles to the matter at hand and essentially

jettisoned the protection of a private individual's reputation in order to confer an absolute privilege on the press for reporting overly embellished and fabricated allegations from a non-newsworthy bankruptcy complaint. From both a legal and laymen perspective, it is unconscionable to conclude, as the majority did, that the 'gist' or 'sting' of said articles were fair and accurate because "stealing" or being labeled as the "recipient of stolen funds" intrinsically implies theft and criminality to an ordinary reader and A.P. 06-01403 plainly did not state, accuse or imply such an allegation or cause of action. Yet, in the majority's view,

> "[t]he use of the word 'steal' was simply not the kind of distortion that we have recognized of stripping a report of...its protections...Any other ruling based on a further mincing of the words of the publication would effectively eviscerate the privilege.[9]"

App 35a. Under the facts of this case, there is simply no justification for the majority to hold that defendants reporting that I was accused of stealing

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[9] After upholding the "full, fair and accuracy" finding, App. 35a, the greatest irony in the majority's holding came in footnote no. 7 which stated: "The existence of the privilege does not affect defendants' obligation to make right the wrong that has been done to plaintiff's reputation as a result of the publications of the false statements in the complaint. A retraction bearing a headline comparable to that used in the reports at issue and placed in a prominent position in the newspaper or website is the least that our citizens expect in these circumstances." App. 35a f.n. 7. Despite this conspicuous acknowledgment, the majority foreclosed my attempt to gain any meaningful relief.

the debtor's funds was synonymous with and carried the same "sting" as being the recipient of an alleged fraudulent transfer. App. 35a. Indeed, the majority could not affirmatively support its decision because words like misappropriate and stealing are not interchangeable when in this *context*. An alleged transferee does not steal from the transferor, it receives from the transferor, as said transferor is informed, knowledgeable and a consented party to the transaction. As the dissent aptly reasoned:

> "Because in common understanding, the word 'steal' describes a criminal act, the headline and the opening sentence conveyed, unmistakably, the message that the subject of the story was being prosecuted for a crime...Polite parsing of the legal nuances as between stealing and a civil complaint charging that one has diverted assets of a bankrupt estate cannot overcome the reality that the choice of the word 'steal' inflicts a far greater sting. To regard that as full, fair and accurate...rewards a choice made to sensationalize stories rather than report them."

App. 57a-58a. The dissent criticized the majority's use of a dictionary definition of the word 'steal' as support for its ordinary understanding. "That approach actually misses the point, because even the definitions quoted [by the majority] demonstrate that the 'sting' of the word choice is far harsher than the truth, and that choosing that value-laden word...created a news report that was both unfair and inaccurate." App. 55a.

After canvassing various definitions of the word "steal," the dissent noted they all "carr[y] with it the clear connotation of a crime, together with its attendant evil-minded mens rea. None of that is faithful to the actual allegations made in the Bankruptcy Court by the Trustee." App. 56a.

The majority's finding now establishes that in New Jersey, any citizen unwillingly dragged into a civil adversary proceeding in bankruptcy court – a court of limited jurisdiction - and who is alleged to have received a fraudulent transfer, may become overnight fodder for salacious consumption by the media who is permitted to portray this individual like a common criminal who should be sized up for stripes. This Court should not allow this misperception to stand and I respectfully ask this Court at minimum and in the interest of justice to summarily reverse the decision below as to this insupportable finding of "fairness and accuracy."

B. The 'Fairness and Accuracy' Finding Directly Conflicts With the Meaning and Purpose of Fraudulent Transfer Law as Delineated by Various Circuit Courts of Appeal and Bankruptcy Courts

The majority below equated the main allegation of receiving an alleged "fraudulent transfer" under 11 U.S.C. §548 with a criminal allegation of "stealing" which turns the purpose behind fraudulent transfer law in bankruptcy on its head and is contrary to the plain language of the statute. See 11 U.S.C. §548. App. 105a-106a. Various federal courts of appeal and bankruptcy courts have explained the purpose and

meaning of fraudulent transfer law in the *context* of bankruptcy proceedings – which by no means implicates "stealing," unlawful motive or ill-intent by the transferee. In *Cybergenics Corp. v. Chinery*, 226 F.3d 237 (3d Cir., 2000), the Third Circuit clearly informed the meaning of "fraudulent conveyance" in the context of a bankruptcy proceeding:

> "The fraudulent conveyance, as known in our law, may be roughly defined as an infringement of the creditor's right to realize upon the available assets of his debtor. That, and none other, is the meaning that should attach to the word 'fraud,' as used in the synonymous term, 'conveyance in fraud of creditors.' It follows that an appreciation of this form of wrongdoing involves, first of all, a clear understanding of the right which is impaired."

Id at 242. See also *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890, 892 (7th Cir.1988) ("the purpose of fraudulent transfer law is to protect creditors from last minute diminutions of the pool of assets in which they have interests."); *In re Hill*, 342 B.R. 183, 195 (Bankr.N.J.,2006)(the purpose of fraudulent conveyance law is "to make available to creditors those assets of the debtor that are rightfully a part of the bankruptcy estate, even if they have been transferred away."). Hence, the law does not state that fraudulent transfers can be avoided to make available to creditors those assets of the debtor even if they have been stolen. Indeed, transfer was the actual language utilized in AP 06-01403—NJMG

fabricated the allegation of stealing which implies theft to any average reader, which on its face automatically infers criminal implications.

In addition, as the Eighth Circuit cautioned "[t]he term 'fraudulent' in the caption of 11 U.S.C. §548 is inapposite, and, at least with respect to §548(a)(2), can certainly be misleading." *In re Young*, 82 F.3d 1407, 1414 (8th Cir. 1996). Similarly, the Bankruptcy Appellate Panel for the Ninth Circuit made it a point to "clarify some points about fraudulent transfers so that common misconceptions do not cloud the analysis. A key problem is that the word 'fraudulent' has such pejorative connotations that it becomes difficult to think dispassionately in the presence of a blameless transferee." *In re Cohen*, 199 B.R. 709, 715-716 (Bankr. 9th Cir., 1996).

Moreover, "[a]s is clear from the statutory language ('if the debtor . . . made such transfer . . . with actual intent...'), the claim of actual fraud looks only to the fraudulent intent of the transferor/debtor. Neither the language of Code §548(a)(1)(A) nor the case law requires the plaintiff to allege or prove that the transferee had any intent to hinder, delay or defraud or any knowledge of the transferor's fraudulent intent." *In re Bayou Group, LLC*, 362 B.R. 624, 631 (Bankr.S.D.N.Y., 2007); *In re Sharp Intern. Corp.*, 403 F.3d 43, 54 (2nd Cir., 2005) ("the issue of intent [under §548(a)] is irrelevant"); *In re H. King & Associates*, 295 B.R. 246, 283 (Bankr. N.D. Ill., 2003) ("The focus in the inquiry into actual intent is on the state of mind of the debtor...Culpability on the part of ... the transferees is not essential.). Therefore, fraudulent conveyance law in bankruptcy and in the

context of AP 06-01403 had nothing to do with 'stealing' which requires ***intent*** upon the one 'stealing.' 'Stealing' signifies an unauthorized 'taking' of something without the knowledge or consent of the person or entity in which one takes from implying moral turpitude. In this case, it was the *debtor* that was alleged to part with its alleged property via transferring it. Journalists should not be permitted to navigate court dockets and merely act as ignorant parrots regurgitating legal "terms of art" and improperly defining their own erroneous meaning to legal concepts in which they know nothing about, especially when their actions are to the detriment and permanent reputational damage of a private individual. This Court should use this case to reinforce the responsibilities that attach to a privilege. A foreign topic with defamatory implications requires a modicum of knowledge on the part of any person reporting it to ensure its fairness and accuracy. This basic concept goes to the heart of and integrity of the profession of journalism and the masses to which it reaches. Certiorari is warranted.

CONCLUSION

Through my case, I am simply acting as a messenger to this Court on behalf of all private citizens of this country on these incredibly important issues which this Court should resolve. For the reasons expressed above, the Court should grant this petition.

Respectfully submitted,

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October 9, 2010

Appendix to petition for a
writ of certiorari to
the N.J. Supreme Court

Salzano v. North Jersey Media Group

App. 1a – App. 106a

SUPREME COURT OF NEW JERSEY
A-78/79 September Term 2008

THOMAS JOHN SALZANO,

Plaintiff-Respondent
and Cross-Appellant,

v.

NORTH JERSEY MEDIA GROUP INC., d/b/a THE RECORD, NORTH JERSEY.COM, MALCOLM BORG, STEPHEN A. BORG, MARTHA MCKAY, and JONATHAN MARKEY,

Defendants-Appellants
and Cross-Respondents,

and

GLEN RIDGE VOICE, INC. and FRANK A. ORECHIO,

Defendants.

Argued October 14, 2009 – Decided May 11, 2010

On certification to the Superior Court, Appellate Division, whose opinion is reported at 403 N.J. Super. 403 (2008).

Bruce S. Rosen argued the cause for appellants and cross-respondents (McCusker, Anselmi, Rosen & Carvelli, attorneys; Jennifer A. Borg and Dina L. Sforza, of counsel; Mr. Rosen, Kathleen A. Hirce, Katherine M. Jensen, and Patrice E. LeTourneau on the briefs).

Thomas John Salzano argued the cause for respondent and cross-appellant pro se.

Thomas J. Cafferty argued the cause for amici curiae New Jersey Press Association, ABC, Inc., Advance Publications, Inc., The New York Times Company, NYP Holdings, Inc., Gannett Co., Inc., The Associated Press, Daily News, L.P., Dow Jones & Company, Inc., NBC Universal, Inc., Courthouse News Services, The Reporters Committee for Freedom of the Press, First Media, Alm Media, Inc. (soon to be known as Incisive Media, LLC), Newspaper Association of America, The American Civil Liberties Union of New Jersey, The Association of American Publishers, Inc., WPIX, Inc., and American Society of Newspaper Editors (Scarinci Hollenbeck and Robinson, Wettre & Miller, attorneys; Donald A. Robinson, of counsel; Mr. Cafferty,

Nomi I. Lowy, and Lauren E. James, on the brief).

JUSTICE LONG delivered the opinion of the Court.

The law of defamation is rooted in the notion that individuals should be free to enjoy their reputations unimpaired by false and defamatory attacks. In some instances, however, publications that otherwise would be actionable may escape liability because we recognize that the publisher is acting in furtherance of a socially important interest that is entitled to protection, even at the expense of uncompensated harm to a plaintiff's reputation. That protection from liability is described as a privilege. One such privilege is accorded to the publication of defamatory matter concerning another in a report of an official action or proceeding, or of a meeting open to the public that deals with a matter of public concern. That privilege, which is denominated the fair-report privilege, recognizes the value we place on the right of the public, in a democratic society, to be informed about a wide variety of official matters. It attaches where the report is accurate and complete or a fair abridgement of the occurrence that is recounted.

This case implicates the fair-report privilege insofar as defendants published information they gleaned from a complaint filed in bankruptcy court. Plaintiff argues that the privilege does not apply to initial court pleadings because there must be some "judicial action" to trigger its protections. The lower courts were divided on that issue. We hold that the principles that inform the fair-report privilege brook

no exception for initial pleadings, which fall squarely within the protective sweep of the privilege.

We are also called upon to determine the nature of the fair-report privilege and whether it is subject to defeat by proof of malice. We hold that the fair-report privilege is a hybrid. It is conditional insofar as it attaches only to full, fair, and accurate reports of government proceedings. It becomes absolute once those prerequisites are met. Fault, sufficient to defeat the privilege, occurs when the publisher fails to do what is necessary to render the report full, fair, and accurate. If the publication, in fact, satisfies that standard, the state of mind of the publisher is irrelevant.

In this case, the portion of the challenged publications that was based upon a bankruptcy complaint was full, fair, and accurate, and thus, immune from a defamation suit because of the fair-report privilege. However, because the publications also contained defamatory information derived from sources other than the complaint, plaintiff may pursue his lawsuit in connection therewith.

I.

In June 2004, NorVergence, Inc. ("NorVergence"), a telecommunications company, abruptly laid off approximately 1,300 employees and disconnected the services it provided to thousands of small businesses. On June 30, 2004, an involuntary bankruptcy petition was filed against NorVergence. On July 14, 2004, NorVergence consented to the entry of an order for relief under Chapter 11 of the Bankruptcy Code and the immediate conversion of the case to a Chapter 7 liquidation proceeding. 11 U.S.C. § 1112(b). On November 4, 2004, the Federal Trade Commission filed suit against NorVergence

because of unfair and deceptive practices. The court entered default judgment against NorVergence and determined that NorVergence caused injury of at least $172,997,758.

Plaintiff Thomas John Salzano is the son of the former chief managing officer/consultant of NorVergence, Thomas N. Salzano, and the nephew of the chief executive officer of NorVergence, Peter J. Salzano. Plaintiff was never an employee of NorVergence.

On March 1, 2006, the trustee for the bankrupt estate of NorVergence filed a complaint against plaintiff in the United States Bankruptcy Court for the District of New Jersey, joining plaintiff as a third-party defendant in the bankruptcy proceeding. More specifically, the complaint sought, pursuant to 11 U.S.C. §§ 544(b), 548(a), 550(a) and N.J.S.A. 25:2-25(a), to avoid fraudulent transfers made to plaintiff, and to impose a constructive trust or equitable lien on the proceeds thereof.

The complaint alleged that plaintiff:

> unlawfully diverted, converted and misappropriated [NorVergence]'s funds for his own personal benefit, and to the detriment of [NorVergence], by, inter alia, (i) applying two NorVergence checks, one in the amount of $61,200.00 dated July 1, 2003, and the other in the amount of $140,000.00 dated July 29, 2003, toward the purchase of his personal residence (the "Purchase Funds") located at 20 Argyle Street, Glen Ridge, NJ (the

"Property") and (ii) by charging personal expenses, such as outings to bars and clubs, clothing and other personal expenses, between November 25, 2002 and March 24, 2004, to [NorVergence]'s American Express Business Gold/Platinum totaling $268,795.84, as well as utilizing other corporate credit cards in undisclosed amounts (the "Charges") (the Charges, together with the []Purchase Funds[], the "Misappropriated Funds.")

[]The Charges were on account of expenditures that were entirely unrelated to [NorVergence]'s business.[NorVergence] transferred $268,795.84 to the AMEX Account between January 13, 2003 and April 20, 2004 in order to pay for the Charges on [plaintiff]'s behalf.

On March 2, 2006, defendant, The Record, published a report with the headline, "Man accused of stealing $500,000 for high living," and the subheading "NorVergence funds were taken." The report, written by defendant Martha McKay, stated in its entirety:

The son of the mastermind behind NorVergence, a bankrupt Newark telecommunications firm, allegedly stole close to $500,000 from the company, using the money to pay for drinks, trips to area

clubs and for a five-bedroom Glen Ridge house, according to court papers filed Wednesday in U.S. Bankruptcy Court in Newark.

Thomas John Salzano, son of Thomas N. Salzano, the chief managing officer of bankrupt NorVergence, was accused of using two company checks -- one in the amount of $61,200 dated July 1, 2003, and another for $140,000 dated July 29, 2003 -- to help pay for "the purchase of his personal residence located at 20 Argyle St., Glen Ridge," the papers said.

The complaint, filed by U.S. Trustee Charles Forman, also alleges that Thomas John Salzano used a NorVergence corporate American Express card to charge "personal expenses, such as outings to bars and clubs, clothing and other personal expenses" unrelated to NorVergence business.

The charges totaling $268,795 were made between November 25, 2002, and March 24, 2004.

Neither Forman nor Salzano could be reached for comment.

NorVergence's abrupt bankruptcy in July 2004[] threw 1,300 people out of work and left thousands of small-business customers without phone and Internet service.

Legal battles raged when customers tried to get out of equipment leases that NorVergence had sold to more than 40 banks and leasing companies. In many cases, settlements have been reached, brokered by state attorneys general, providing some relief to deeply angry NorVergence customers.

Last year, a U.S[.] District Court ordered a $181.7 million default judgment against NorVergence in a case brought by the Federal Trade Commission.

Creditors assert the company owes $550 million.

Thomas John Salzano was never an employee of NorVergence, according to court papers. His father, Thomas N. Salzano, was paid hundreds of thousands of dollars as a consultant. His uncle, Peter J. Salzano, served as CEO.

Thomas John Salzano and his father started a Kenilworth business last year called Charity Snack, which also went belly-up.

The complaint filed Wednesday asks that Salzano repay what he allegedly took, plus punitive damages. In addition, the papers claim that because of his "unlawful misappropriation of [NorVergence's] funds, and fraudulent transfer[s] and unjust enrichment[,]" the house at 20 Argyle St.

> belongs to the trustee, whose job it is to recover any and all company assets.
>
> The five-bedroom, three-bath home at 20 Argyle St. is listed for sale at $699,000, just reduced, according to a real estate Web site.

On the same date, the report was posted on the website of defendant NorthJersey.com, with the same headline but without the subheading. On March 9, 2006, the report was republished by defendant, Glen Ridge Voice, under the headline, "Argyle residence allegedly bought with stolen funds." It was also posted on the website of LeasingNews.org under the headline, "NorVergence BK charges Salzano son stealing $1/2 MM."[1]

On February 20, 2007, plaintiff filed a pro se complaint alleging defamation and associated torts against defendants North Jersey Media Group, Inc. ("NJMG"), which publishes The Record; Malcolm Borg, NJMG's CEO; Jonathan Markey, NJMG's president; NorthJersey.com; Stephen A. Borg, editor/publisher of The Record and NorthJersey.com; Martha McKay, staff reporter for The Record and author of the report; Glen Ridge Voice, Inc., which publishes Glen Ridge Voice; and Frank A. Orechio, the president of Glen Ridge Voice (collectively "defendants"). Plaintiff specifically contended that the following statements were false and defamatory:

1. The headline in The Record and on NorthJersey.com: "Man accused of stealing $500,000 for high living";

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[1] LeasingNews.org was not named as a defendant in this case.

2. The subheading in The Record: "NorVergence funds were taken";

3. The headline in Glen Ridge Voice: "Argyle residence allegedly bought with stolen funds";

4. The headline on LeasingNews.org: "NorVergence BK charges Salzano son stealing $1/2 MM";

5. From the text of all of the reports: "The son of the mastermind behind NorVergence . . . allegedly stole close to $500,000 from the company . . ."; and

6. From the text of all of the reports: "Thomas John Salzano and his father started a Kenilworth business last year called Charity Snack, which also went belly-up."

Plaintiff alleged that the statements were defamatory per se in that the use of the words "stealing," "stolen funds," and "taken" imputed criminal conduct to him; that the trustee's assertions were baseless and unsupported; that defendants republished them "intentionally, maliciously, and with reckless and/or negligent disregard of the truth"; and that defendants "knew or should have known of their falsity."

The complaint included one count of gross negligence for failure to "perform any due diligence or inquiry into the true nature of the adversarial

complaint" and failure to "conduct a fair reading [of the complaint], by which a reasonable person would have determined" that the trustee neither alleged nor implied "'stealing' of any kind." In addition, the complaint claimed invasion of privacy (public disclosure of private facts) in connection with the report's multiple allusions to plaintiff's home address, where his mother and two minor sisters live, potentially putting them at risk of retaliation from "disgruntled ex-NorVergence employees and/or former customers." The complaint further claimed invasion of privacy (false light); malice; and negligent and intentional infliction of emotional distress. Plaintiff sought presumed, consequential, compensatory, and punitive damages, as well as costs, along with a retraction.

Defendants moved to dismiss for failure to state a claim on which relief can be granted. R. 4:6-2(e). They argued, among other things, that their reporting was covered by the fair-report privilege, and that, in the alternative, the reports were not defamatory because they were accurate and not made maliciously.

The trial judge granted the motion and dismissed plaintiff's complaint in a rather brief opinion:

> Look, I'm going to grant the motion as -- with regard to the named defendants in the motion for several reasons. One is I do not feel that the defendant -- that the plaintiff' position with regard to the statements is a reasonable interpretation of that and that, in any case, the -- this

> matter is subject to the heightened standard of malice and that there is in fact no reasonable showing of any malice. I can understand why plaintiff is upset with regard to the reporting as not being totally, 100 percent accurate. But that's not the standard we apply. And based on the arguments presented I find that this matter -- that the complaint does fail to state a cause of action in defamation with regard to these particular defendants. And I so rule.

The Appellate Division reversed and remanded the case for trial. Salzano v. N. Jersey Media Group Inc., 403 N.J. Super. 403 (App. Div. 2008). Although the panel concluded that the report was a full, fair, and accurate report of the bankruptcy complaint, it recognized the initial pleadings exception and declared that the fair-report privilege did not apply. Id. at 418, 421. The panel further ruled that the malice standard is applicable with respect to the NorVergence bankruptcy related statements because the bankruptcy was a matter of public concern. Id. at 422. Finally, the panel ruled that the claim regarding the allegations that the Kenilworth business "went belly-up" should not have been dismissed. Id. at 425. With respect to that claim, the Appellate Division stated that it could not determine whether the malice standard was applicable on the scant record before it and

remanded for the development of a full record by the trial judge and for amendment of the complaint. Id. at 424-26. Because the panel reversed the order of dismissal, it did not separately address plaintiff's remaining claims (i.e., invasion of privacy and infliction of emotional distress), except to note that "the parties may continue to pursue [those issues] in the trial court." Id. at 411 n.2.

Defendants petitioned for certification challenging the existence of the initial pleadings exception. Plaintiff cross-petitioned regarding the conclusion that the reports were full, fair, and accurate, and with respect to the application of the malice standard. We granted both petitions. 200 N.J. 476 (2009).

II.

On the petition, defendants argue that there is no initial pleadings exception to the fair-report privilege; to the extent that earlier case law recognized such an exception, it has been eclipsed by modern jurisprudence; the reports in this case were full, fair, and accurate, and thus cannot serve as the basis for a defamation action; if the privilege is deemed not to insulate any or all reports at issue here, malice is the standard that plaintiff must satisfy because the reports touched on matters of public concern. Amicus New Jersey Press Association is in fundamental agreement with defendants.

On the cross-petition, plaintiff argues that some judicial action must occur before the fair-report privilege operates; the initial pleadings exception is well-established and was properly applied; the reports were not full, fair, and accurate, and thus are not protected by the privilege; and because he is a

private citizen he should not be held to the actual malice standard in his defamation suit.

III.

A defamatory statement is one that is false and harms the reputation of another such that it lowers the defamed person in the estimation of the community or deters third parties from dealing with that person. See Romaine v. Kallinger, 109 N.J. 282, 289 (1988); Restatement (Second) of Torts (hereinafter "Restatement") § 559 (1977). Defamation law generally imposes liability upon one who repeats or republishes the defamatory statements of another. See, e.g., Lawrence v. Bauer Publ'g & Printing Ltd., 89 N.J. 451, 461, cert. denied, 459 U.S. 999, 103 S. Ct. 358, 74 L. Ed. 2d 395 (1982); Restatement, supra, § 578. Indeed, earlier in our history, the common law placed "so high a premium on the protection of a person's reputation that it imposed strict liability for the publication of a defamatory statement." Dairy Stores, Inc. v. Sentinel Publ'g Co., Inc., 104 N.J. 125, 136 (1986) (citing W.P. Keeton et al., Prosser & Keeton on Torts § 113 at 804 (5th ed. 1984)).

> More recently, the United States Supreme Court has declared that publishers may not be held liable for certain defamatory statements without showing that they were at least negligent. Gertz v. Robert Welch, Inc., [] 418 U.S. [323,] [] 346-47, 94 S. Ct. [2997,] [] 3010, 41 L. Ed. 2d [789,] [] 809 [1974]. That declaration is consistent with the increasing awareness of the need

> for public information on a wide variety of issues.
>
> Traditionally, the common law has accommodated that need by recognizing that some otherwise defamatory statements should be "privileged," i.e., that their publication does not impose liability on the publisher.
>
> [Id. at 136.]

In short,

> the law of defamation has undergone dramatic changes to adjust to modern times -- strict liability is now gone, fault must be proven, and the falsity of a defamatory statement is no longer presumed. . . . Nevertheless, reputation is still valued as essential to human dignity and worth. It is not a historical relic but remains important to the unique identity of every individual in our contemporary world.
>
> [Senna v. Florimont, 196 N.J. 469, 490-91 (2008) (citation omitted).]

At issue here is the fair-report privilege, which protects the publication of defamatory matters that appear in a report of an official action or proceeding, or of a meeting open to the public that

deals with a matter of public concern. The fair-report privilege reflects the judgment that the need, in a self-governing society, for free-flowing information about matters of public interest outweighs concerns over the uncompensated injury to a person's reputation. That public information rationale was elucidated by the United States Supreme Court:

> [I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.
>
> [Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 491-92, 95 S. Ct. 1029, 1044, 43 L. Ed. 2d 328, 347 (1975).]

Part and parcel of the public information theory is that no risk should be imposed on those who bring important public information forward. Medico v. Time, Inc., 643 F.2d 134, 142 (3d Cir.), cert. denied, 454 U.S. 836, 102 S. Ct. 139, 70 L. Ed. 2d 116 (1981).

Also informing the fair-report privilege is the theory of public supervision, an analogue of the public information rationale, which Justice Holmes described as follows:

> [The privilege is justified by] the security which publicity gives for the proper administration of justice. . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.
>
> [Cowley v. Pulsifer, 137 Mass. 392, 394 (1884).]

Another reason for the fair-report privilege is the so-called "agency" or "public eye" theory: "[O]ne who reports what happens in a public, official proceeding acts as an agent for persons who had a right to attend, and informs them of what they might have seen for themselves." Medico, supra, 643

F.2d at 141. In other words, if a member of the citizenry "could have witnessed the defamation, he is entitled to be made aware of it." Id. at 141 n.22.

The fair-report privilege is considered to be "one of the most powerful and frequently invoked common-law defenses," Rodney A. Smolla, Law of Defamation § 8.67 (Thomson Reuters/West, 2d ed. 2008), and is widely recognized in judicial decisions and by statute.[2]

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[2] The fair-report privilege has been recognized by common law or statute in at least forty-seven states and the District of Columbia. See Ariz. Rev. Stat. Ann. § 12-653; Cal. Civ. Code § 47(d), (e); Ga. Code Ann. § 51-5-7; Idaho Code Ann. § 6-713; Ky. Rev. Stat. Ann. § 411.060; La. Rev. Stat. Ann. § 14:49(1); Mich. Comp. Laws § 600.2911(3); N.J.S.A. 2A:43-1; N.Y. Civ. Rights Law § 74; N.D. Cent. Code § 14-02-05(4); Ohio Rev. Code Ann. § 2317.04; Okla. Stat. Ann. tit. 12, § 1443.1; S.D. Codified Laws § 20-11-5(4); Tex. Civ. Prac. & Rem. Code Ann. § 73.002; Utah Code Ann. § 45-2-3; Wis. Stat. Ann. § 895.05(1); Wyo. Stat. Ann. § 1-29-104; Parsons v. Age-Herald Publ'g Co., 61 So. 345, 348 (Ala. 1913); Green Acres Trust v. London, 688 P.2d 617, 621 (Ariz. 1984); Butler v. Hearst-Argyle Television, Inc., 49 S.W.3d 116, 120 (Ark. 2001); Kurata v. L.A. News Publ'g Co., 40 P.2d 520, 522 (Cal. Ct. App. 1935); Meeker v. Post Printing & Publ'g Co., 135 P. 457, 458 (Colo. 1913); Burton v. Am. Lawyer Media, Inc., 847 A.2d 1115, 1119 (Conn. App. Ct.), certif. denied, 853 A.2d 526 (Conn. 2004); Read v. News-Journal Co., 474 A.2d 119, 121 (Del. 1984); Ortega v. Post-Newsweek Stations, Florida, Inc., 510 So. 2d 972, 975 (Fla. Dist. Ct. App.), rev. denied, 518 So. 2d 1277 (Fla. 1987); Shiver v. Valdosta Press, 61 S.E.2d 221, 224-25 (Ga. Ct. App. 1950); Murphy v. Maui Publ'g Co., 23 Haw. 804, 810 (1917); Solaia Tech., LLC v. Specialty Publ'g Co., 852 N.E.2d 825, 842 (Ill. 2006); Patten v. Smith, 360 N.E.2d 233, 236 (Ind. Ct. App. 1977); Flues v. New Nonpareil Co., 135 N.W. 1083, 1085 (Iowa 1912); Gobin v. Globe Publ'g Co., 531 P.2d 76, 80-81 (Kan. 1975); Paducah Newspapers, Inc. v. Bratcher, 118 S.W.2d 178, 179 (Ky. 1938); Rosenberg v. Helinski, 616 A.2d 866, 872 (Md. 1992); Sanford v. Boston Herald-Traveler Corp., 61 N.E.2d 5, 6 (Mass. 1945); Park v. Detroit Free Press Co., 40 N.W. 731, 734

The privilege has deep roots in New Jersey. See, e.g., Schwarz Bros. Co. v. Evening News Publ'g Co., 84 N.J.L. 486, 496 (1913) (recognizing "reports of judicial proceedings are absolutely privileged, as are fair reports of debates in legislative bodies"). See

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(Mich. 1888); Nixon v. Dispatch Printing Co., 112 N.W. 258, 259 (Minn. 1907); Brocato v. Miss. Publishers Corp., 503 So. 2d 241, 244 (Miss. 1987); Hoeflicker v. Higginsville, 818 S.W.2d 650, 651 (Mo. Ct. App. 1991); Cox v. Lee Enter., Inc., 723 P.2d 238, 239-40 (Mont. 1986); Fitch v. Daily News Publ'g Co., 217 N.W. 947, 948 (Neb. 1928); Sahara Gaming Corp. v. Culinary Workers Union Local 226, 984 P.2d 164, 166 (Nev. 1999); Hayes v. Newspapers of New Hampshire, Inc., 685 A.2d 1237, 1238 (N.H. 1996); Costello v. Ocean City Observer, 136 N.J. 594, 606 (1994); Henderson v. Dreyfus, 191 P. 442, 452 (N.M. 1919); Campbell v. N.Y. Evening Post, Inc., 157 N.E. 153, 155 (N.Y. 1927); LaComb v. Jacksonville Daily News Co., 543 S.E.2d 219, 220-21 (N.C. Ct. App.), rev. denied, 550 S.E.2d 778 (N.C. 2001); McCurdy v. Hughes, 248 N.W. 512, 516 (N.D. 1933); Williams v. P. W. Publ'g Co., 140 N.E.2d 809, 811 (Oh. Ct. App. 1957); Wright v. Grove Sun Newspaper Co., 873 P.2d 983, 987 (Okla. 1994); Kilgore v. Koen, 288 P. 192, 194-95 (Or. 1930); Weber v. Lancaster Newspapers, Inc., 878 A.2d 63, 72 (Pa. Super. Ct. 2005), appeal denied, 916 A.2d 634 (2007); Trainor v. Standard Times, 924 A.2d 766, 770-71 (R.I. 2007); Lybrand v. State Co., 184 S.E. 580, 584 (S.C. 1936); Williams v. Black, 124 N.W. 728, 731-32 (S.D. 1910); Langford v. Vanderbilt Univ., 318 S.W.2d 568, 574 (Tenn. Ct. App. 1958); A. H. Belo & Co. v. Lacy, 111 S.W. 215, 217 (Tex. Civ. App. 1908); Lancour v. Herald & Globe Ass'n, 17 A.2d 253, 258 (Vt. 1941); O'Brien v. Tribune Publ'g Co., 499 P.2d 24, 30-31 (Wash. Ct. App.), rev. denied, 81 Wn.2d 1007 (Wash. 1972), cert. denied, 411 U.S. 906, 93 S. Ct. 1531, 36 L. Ed. 2d 196 (1973); Crump v. Beckley Newspapers, Inc., 320 S.E.2d 70, 77-78 (W. Va. 1983); Ilsley v. Sentinel Co., 113 N.W. 425, 425 (Wis. 1907); Johnson v. Johnson Publ'g Co., 271 A.2d 696, 698 (D.C. 1970). See also Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1097 (4th Cir. 1993) (recognizing fair report doctrine as a matter of federal law).

also N.J.S.A. 2A:43-1[3] (addressing privileged character attaching to the publication by specified press defendants of judicial and other proceedings).

The first issue here, on which the courts below were divided, is whether the privilege applies to reports regarding the contents of filed pleadings in advance of any judicial action regarding those pleadings. Defendants answer that question in the affirmative and plaintiff in the negative.

Because New Jersey courts have looked to section 611 of the Restatement for guidance in applying the fair-report privilege, we begin our analysis there. See Costello, supra, 136 N.J. at 607; Darakjian v. Hanna, 366 N.J. Super. 238, 245 (App. Div. 2004); Fortenbaugh v. N.J. Press, Inc., 317 N.J. Super. 439, 448-49 (App. Div.), certif. denied, 160 N.J. 91 (1999); Orso v. Goldberg, 284 N.J. Super. 446, 451-52 (App. Div. 1995); Molnar v. Star-Ledger, 193 N.J. Super. 12, 20 (App. Div.), certif. denied, 99 N.J. 162 (1984). Section 611 provides:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

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[3] Originally enacted by L. 1928, c. 256, § 1. The statute remains virtually unchanged since 1928.

> [Restatement, supra, § 611.]

Comment e to that section, in turn, prescribes:

> [t]he publication . . . of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the rule stated in this Section. An important reason for this position has been to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its content and then dropping the action.
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> [Restatement, supra, § 611 comment e.]

In Costello, in which the fair-report privilege was deemed inapplicable because the publication was not full, fair, and accurate, we commented, in dictum, that:

> "[I]t is the prevailing view, with some few courts to the contrary, that a pleading or a deposition filed in a case but not yet acted upon may not be reported under the claim

> of privilege." Prosser & Keeton on Torts, supra, at § 115. To rule otherwise would promote the filing of lawsuits that would be promptly discontinued once the goal of public defamation or even extortion were achieved. Because the privilege does not apply to newly filed complaints, "[a] mere contemplated lawsuit not yet begun is clearly not enough" to trigger the privilege's protections. Ibid.
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> [Costello, supra, 136 N.J. at 611-12.]

It is that dictum on which plaintiff relies for his view that we have adopted an initial pleadings exception. But in Costello we also said:

> Neither party, however, has raised that issue. Furthermore[,] given our holding that the fair-report privilege does not apply because the article was not a "full, fair and accurate" report, we need not resolve that thorny issue.

[Id. at 612.]

The issue in this case is the one left unresolved in Costello: Is an initial pleading within the protective sweep of the fair-report privilege?

In providing an answer, we note that in the early twentieth century, the initial pleadings exception was adopted in a number of jurisdictions. See Parsons, supra, 61 So. at 348; Meeker, supra, 135 P. at 458; Murphy, supra, 23 Haw. at 810-11; Flues, supra, 135 N.W. at 1085-86; Sanford, supra, 61 N.E.2d at 6; Nixon, supra, 112 N.W. at 259; Byers v. Meridian Printing Co., 95 N.E. 917, 918 (Ohio 1911), superseded by statute, Ohio Rev. Code. Ann. § 2317.05 (1953); A. H. Belo & Co., supra, 111 S.W. at 218; Ilsley, supra, 113 N.W. at 427 (reasoning that extending privilege to reports of initial pleadings that have not been brought before a court would permit protection of libelous and defamatory statements simply by filing complaint).

However, today among our sister jurisdictions, there is a clear trend away from recognizing the initial pleadings exception. Indeed, most modern court decisions have rejected that exception. See, e.g., Bull v. LogEtronics, Inc., 323 F. Supp. 115, 135 (E.D. Va. 1971) (holding press release regarding allegations in initial pleadings privileged as fair and accurate account of issues in suit); Johnson, supra, 271 A.2d at 698 (applying fair-report privilege to publication of allegations contained in complaint for divorce); Solaia Tech., supra, 852 N.E.2d at 844 (joining "growing trend," declining to adopt initial pleadings exception); Hoeflicker, supra, 818 S.W.2d at 651-52 ("The Restatement position that a privilege does not attach for publication concerning

the contents of a petition prior to any judicial action thereon has come under increasing attack."); Cox, supra, 723 P.2d at 240 (finding "the filing of a complaint was intended to be included within the phrase 'judicial proceeding'"); Sahara Gaming Corp., supra, 984 P.2d at 168 (applying fair-report privilege to republication of complaint alleging fraud); April v. Reflector-Herald, Inc., 546 N.E.2d 466 (Ohio Ct. App. 1988) (applying fair-report privilege to report of EEOC complaint for age discrimination); Weber, supra, 878 A.2d at 72 ("The fair report privilege extends to court pleadings, such as a complaint.") (citing First Lehigh Bank v. Cowen, 700 A.2d 498, 502 (Pa. Super. Ct. 1997) ("We find no sense to the argument that newspapers, or other media groups, cannot report on pleadings prior to judicial action without opening themselves to a libel action."), appeal denied, 903 A.2d 539 (Pa. 2006)); O'Brien, supra, 499 P.2d at 30 (holding in connection with initial pleadings exception, "we think the more recent trend of the law is to the contrary").

In all, the majority of jurisdictions that have considered the issue extend the fair-report privilege to encompass initial pleadings and filings.[4] See

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[4] In addition to the cases cited above, several states have created a statutory privilege that applies to pleadings. For example, in Ohio

> [t]he publication of a fair and impartial report of the return of any indictment, the issuing of any warrant, the arrest of any person accused of crime, or the filing of any affidavit, pleading, or other document in any criminal or civil cause in any court of competent jurisdiction,

Laurence H. Eldredge, The Law of Defamation, § 79(b)(1) (1978):

> It is perfectly clear, with respect to cases decided since 1972, that the heavy weight of authority is contrary to the earlier rule, and is that the report of pleadings filed in court which have not yet come before a judicial officer and upon which no judicial action has been taken comes within the privilege to report "judicial proceedings". The trend is strongly in this direction.
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> [(quoted in Hanish v. Westinghouse Broad. Co., 487 F. Supp. 397, 401 (E.D. Pa. 1980)).]

The rationale for the modern approach is four-pronged according to Solaia:

> First, the filing of a complaint is itself a public act. Second, the privilege serves the public's interest in the judicial system, and this interest begins with the filing of a complaint. Third, a

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> or of a fair and impartial report of the contents thereof, is privileged[.]
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> [Ohio Rev. Code Ann. § 2317.05; accord Ky. Rev. Stat. Ann. § 411.060; Wyo. Stat. Ann. § 1-29-105.]

> judicial-action limitation on the privilege would purportedly decrease the risk of publishing scurrilous pleadings, but this limitation is ineffective: Simply because a suit has proceeded to the point where judicial action of some kind has taken place does not necessarily mean that the suit is less likely to be groundless and brought in bad faith. Fourth, the public has a sophisticated understanding of the court system and is capable of evaluating information gleaned from a complaint.
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> [Solaia, supra, 852 F. Supp. 2d at 844 (internal quotation marks and citations omitted).]

In addition, it has been recognized that a suit for malicious prosecution or malicious use of process may be instituted against those who file groundless lawsuits, thus providing an aggrieved plaintiff a remedy for defamation in an initial complaint and serving as a deterrent to filing groundless lawsuits. See, e.g., Hoeflicker, supra, 818 S.W.2d at 652 (rejecting initial pleadings exception partly because suit for malicious prosecution provides remedy for filing of groundless suits). Thus, "[t]he damage resulting from use of the filing of a complaint or petition to disseminate a libel is better addressed by aggressive pursuit of sanctions against attorneys and parties who make allegations in bad faith or

without support than by permitting redress against a republisher." Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 7.3.2.2.4. (PLI Press, 3d ed. 1999).

We now align ourselves with the weight of modern authority and hold that the fair-report privilege extends to defamatory statements contained in filed pleadings that have not yet come before a judicial officer. Indeed, the initial pleadings exception is at odds with the reality that the complaint is open to public view. See R. 1:38 (making court records public). "'[T]he presumption of openness to court proceedings requires more than a passing nod. Open access is the lens through which the public views our government institutions.'" Verni ex rel. Burstein v. Lanzaro, 404 N.J. Super. 16, 28 (App. Div. 2008) (quoting Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 307, 323 (App. Div. 2006)). "An open and transparent court system is an integral part of our democratic form of government. In a democratic society, the public has a right of access not only to our courts, but also to court records." Report of the New Jersey Supreme Court Special Committee on Public Access to Court Records § 2.1.1 (Nov. 29, 2007). "The presumption of public access . . . attaches to all materials, documents, legal memoranda and other papers 'filed' with the court that are relevant to any material issue involved in the underlying litigation . . . regardless of whether the trial court relied on them in reaching its decision on the merits." Lederman, supra, 385 N.J. Super. at 316-17. If the initial pleadings exception is retained, an anomalous result obtains: Public documents to which the citizens of our state have free access

cannot be disseminated or reported on without risk of a lawsuit.

Because it is impossible for the citizenry to monitor all of the operations of our system of justice, we rely upon the press for vital information about such matters. Members of the public simply cannot attend every single court case and cannot oversee every single paper filing, although clearly entitled to do so. Thus, it is critical for the press to be able to report fairly and accurately on every aspect of the administration of justice, including the complaint and answer, without fear of having to defend a defamation case and without the inhibitory effect of such fear.

That interpretation of the privilege more fully advances the principles informing it than any other view. Indeed, if a citizen presents himself at the local courthouse, there is no question but that he can see filed pleadings for himself. They are not sanitized nor are they filtered through a veracity lens. A full, fair, and accurate report of the contents of the pleadings, that is, what plaintiff claims and how defendant defends, places the citizen in the exact same position as if he were present on the scene. From that perspective, interposing an artificial barrier between the citizen and a truthful and accurate report of what is actually occurring makes no sense.

Likewise, the public information and supervisory rationales cannot receive full throat where the initial pleadings exception is honored. What our citizens need to know to carry out their role in a democracy is what, in fact, has been filed in court and how the judicial system responds to it. In that context, the truth or falsity of the initial

allegations and defenses is essentially unimportant to those goals. To be sure, the righteousness of the initial pleadings ultimately will need to be resolved in court, but there is no warrant for those pleadings to receive disparate treatment from the rest of the judicial process.

Another important weight in this calculus is the fact that our law provides protections for individuals against whom frivolous lawsuits are filed. Obviously malicious prosecution actions may be advanced. Further, sanctions may be imposed for frivolous pleadings. N.J.S.A. 2A:15-59.1. Likewise, litigants and attorneys must certify that pleadings are "not being presented for any improper purpose" under penalty of sanctions and fees. R. 1:4-8. In addition, the Rules of Professional Conduct prohibit an attorney from bringing or defending a proceeding "unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous[.]" RPC 3.1.

For those reasons, the suggested policy rationale for the initial pleadings exception, explicitly stated in comment e -- the fear that parties will file scurrilous complaints and then withdraw them after the damage is done -- is already addressed through other means: this State's proscriptions against frivolous litigation. Moreover, as the critics of the initial pleadings exception point out, simply because "judicial action" has taken place does not mean that a suit will not turn out to be groundless. Further, given the vicissitudes of the litigation process, the formless requirement of some judicial action regarding a pleading could well preclude publication about the details of a lawsuit for months, if not years.

In short, we are convinced that the public policy underpinning of the fair-report privilege -- advancement of the public's interest in the free flow of information about official actions -- would be thwarted by the recognition of the initial pleadings exception. A full, fair, and accurate report regarding a public document that marks the commencement of a judicial proceeding deserves the protection of the privilege.

We turn then to this case. At issue here is a report regarding a bankruptcy complaint. That a bankruptcy court is a part of the apparatus of the administration of justice is indisputable. Moreover, it is clear that when statements made at argument or during a plenary hearing in a bankruptcy proceeding are reported accurately, the report has the protections of the fair-report privilege. See Price v. Walters, 918 P.2d 1370, 1374-75 (Okla. 1996) (applying statutory privilege to report of bankruptcy proceeding); Restatement, supra, § 611 comment d (stating that the privilege applies "to the report of proceedings before any court"). The filing of a bankruptcy complaint marks the commencement of that judicial proceeding. It is a public document,[5] without which the proceeding cannot occur. As such, the complaint is as much a part of the judicial process as anything that takes place after "judicial action" occurs. Thus, for the reasons that we have expressed, defendants' report of the contents of the

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[5] 11 U.S.C. § 107: "(a) Except as provided in subsections (b) and (c) of this section and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." See also Collier on Bankruptcy § 1-107 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009).

bankruptcy complaint is subject to the application of the fair-report privilege. To the extent that the Appellate Division ruled otherwise based on the initial pleadings exception, we reverse.

IV.

Because the application of the privilege is dependent on the fairness and accuracy of the report, we next turn to that analysis. As we have said, in order for the privilege to apply, the publication must be a "full, fair, and accurate account of the official proceeding." Costello, supra, 136 N.J. at 607 (citing Bock v. Plainfield Courier-News, 45 N.J. Super. 302, 307 (App. Div. 1957)).

> A report that is accurate may not be edited and deleted in a way that renders its contents misleading. Fairness requires that although the report need not be exhaustive, "it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it . . . ." [Restatement, supra, § 611 comment f]. Although a reporter is allowed to make factual errors and omissions, the fair-report privilege will not protect a story if the errors and omissions mislead readers.
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> [Id. at 608.]

"[I]t is not necessary that [the account] be exact in every immaterial detail . . . . It is enough

that it conveys to the persons who read it a substantially correct account of the [contents of the official document]." Costello, supra, 136 N.J. at 607 (alterations in original) (quoting Restatement, supra, § 611 comment f). "A 'fair' report need not be a verbatim report; it is enough that the report be 'a rough-and-ready summary that is substantially correct.'" Riley v. Harr, 292 F.3d 282, 296 (1st Cir. 2002). "Similarly, a journalist's report need not describe legal proceedings in technically precise language." Ricci v. Venture Magazine, Inc., 574 F. Supp. 1563, 1567 (D. Mass. 1983). "It is for the court to determine as a matter of law whether the report is a full, fair, and accurate account, and this determination is an objective one." Ricciardi v. Weber, 350 N.J. Super. 453, 471 (App. Div. 2002) (citing Costello, supra, 136 N.J. at 607), certif. denied, 175 N.J. 433 (2003). Courts hearing defamation claims are to apply "a common sense standard of expected lay interpretation of media reports of trials, rather than inquiring whether a report was strictly correct in defining legal charges and describing legal rulings." Ricci, supra, 574 F. Supp. at 1567.

However, we do not hesitate to intervene where real inaccuracies in the nature of distortions occur. For example, in Costello, we held that an article regarding the allegation of police misconduct was inaccurate due, among other things, to the use of the present verb tense in the headline and opening paragraph, which suggested that legal action was pending, when in fact, the alleged victim did not file a lawsuit. Costello, supra, 136 N.J. at 608-09. Similarly, in Schiavone Construction Co. v. Time, Inc., 847 F.2d 1069, 1088 (3d Cir. 1988), the

court held inaccurate an article that reported that the plaintiff's name had been mentioned in an FBI memorandum regarding Jimmy Hoffa's disappearance, but failed to report that the memorandum also explicitly stated that the plaintiff did not appear to have any organized crime associations or to be involved in the criminal elements of the case. Likewise, accurately reporting a twenty-three-year-old charge of public corruption but failing, in the same article, to report the subsequent dismissal of the charge is not covered by the fair-report privilege. Reilly, supra, 176 N.J. Super. at 327; see also Fortenbaugh, supra, 317 N.J. Super. at 452-453 (relying on Reilly to hold fair-report privilege inapplicable to report inaccurately claiming professor was subject of public lewdness complaint). None of those cases is similar to what occurred here. In each, the truth was not "as broad as the defamatory imputation or 'sting' of the statement." Lawrence, supra, 89 N.J. at 460.

Here, although the headline "NorVergence funds were taken," without any other detail, is imprecise insofar as the fact of the "taking" had not been adjudicated, the headline is not to be considered in a vacuum but must be viewed on the backdrop of the entire report. See Costello, supra, 136 N.J. at 609, 611; Molin v. Trentonian, 297 N.J. Super. 153, 158 (App. Div.), certif. denied, 152 N.J. 190 (1997), cert. denied, 525 U.S. 904, 119 S. Ct. 239, 142 L. Ed. 2d 196 (1998). Indeed, we presume that the public reads the entire article when we assess its fairness and accuracy. Here, the article stated that it was reporting the "allegations" in the trustee's complaint and that it was the trustee who charged that plaintiff had fraudulently received NorVergence

assets. The first paragraph of the report notes that the allegations were made against plaintiff in "court papers filed Wednesday in U.S. Bankruptcy Court in Newark," and other sections of the report discuss other specific details of the complaint itself. Thus, a reasonable person would understand that the complaint alleged certain facts, but that those allegations had not yet been adjudicated.

To be sure, the report and headline used the words "stolen" and "stealing," which were not used in the complaint; however, plaintiff's contention that that made the report inaccurate is wide of the mark. In common parlance, the terms "misappropriate" and "steal" are equivalent. Indeed, "misappropriate" is actually defined as: "1a. To appropriate wrongly . . . b. To appropriate dishonestly for one's own use: Embezzle." Webster's II New College Dictionary 717 (3rd ed. 2005). "Dishonest[ly]," in turn, is defined as: "[t]ending to lie, cheat, or deceive." Id. at 332. "Cheat" is defined as: "[f]raudulent acquisition of another's property." Id. at 195. Concomitantly, "steal" is defined as: "[t]o take (the property of another) without right or permission." Id. at 1104. Given those definitions, the allegation in the complaint that plaintiff "unlawfully misappropriated" funds belonging to NorVergence fits comfortably within the definition of "steal." Indeed, it is clear that the fair and natural meaning of the word "steal" given by reasonable persons of ordinary intelligence is "misappropriate."[6] See

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[6] Our attorney discipline cases have specifically described misappropriation as a matter in which "[t]he attorney had stolen his clients' money." See, e.g., In re Wilson, 81 N.J. 451, 456 (1979). We have likewise utilized the terms "misappropriation" and "stealing" interchangeably in our ethics

Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 585 (2009) (citations omitted). Put another way, to an ordinary citizen, the "sting" of the reports was essentially the same as that of the complaint insofar as the trustee alleged that plaintiff "unlawfully diverted, converted and misappropriated" NorVergence funds "for his own personal benefit." The use of the word "steal" was simply not the kind of distortion that we have recognized as stripping a report of a public proceeding of its protections.

Moreover, the remainder of the report clearly states that the allegations were made by the trustee in a bankruptcy complaint, and not in any sort of criminal proceeding. Cf. Sivulich v. Howard Publ'ns, Inc., 466 N.E.2d 1218, 1220 (Ill. App. Ct. 1984) (affirming summary judgment for defendant in defamation case where article reported "[c]harges of aggravated battery have been filed" to describe civil complaint for assault).

As the Appellate Division correctly observed, "a finer point can be put" on the trustee's allegations. However, although the publication is not a verbatim regurgitation of the complaint, it does not need to be. It is substantially correct and that is all that is required. Any other ruling based on a further mincing of the words of the publication would effectively eviscerate the privilege. In sum, we are satisfied, as was the Appellate Division, that the report of the complaint was a full, fair, and accurate

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decisions. See, e.g., In re Greenberg, 155 N.J. 138, 149 (1998), cert. denied, 526 U.S. 1132, 119 S. Ct. 1807, 143 L. Ed. 2d 1011 (1999).

one. Accordingly, it enjoys the protections of the fair-report privilege.[7]

V.

Because the Appellate Division applied the initial pleadings exception, it did not address the issue of whether a plaintiff in a defamation action can overcome the fair-report privilege in a case, such as this, in which the publication is, in fact, full, fair, and accurate. The resolution of that issue, which must be decided because of our ruling that the privilege applies, depends to a large extent on the characterization of the fair-report privilege.

In the defamation context, privileges generally fall into one of two categories: absolute and conditional (also known as qualified). Dairy Stores, supra, 104 N.J. at 136; Restatement, supra, §§ 583 to -612. An absolute privilege is an immunity from liability which springs from society's recognition that "the need for unfettered expression is crucial to the public weal." Dairy Stores, supra, 104 N.J. at 136. Thus, the privilege is complete. See, e.g., Hawkins v. Harris, 141 N.J. 207, 213 (1995) (recognizing absolute privilege for legislative statements made in performance of legislator's duties); Rainier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 558 (1955) (recognizing absolute privilege for judges, attorneys, witnesses, parties and jurors for utterances made in course of judicial proceedings).

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[7] The existence of the privilege does not affect defendants' obligation to make right the wrong that has been done to plaintiff's reputation as a result of the publications of the false statements in the complaint. A retraction bearing a headline comparable to that used in the reports at issue and placed in a prominent position in the newspaper or website is the least that our citizens expect in these circumstances.

The second class -- conditional privileges -- provide insulation from liability, but the insulation is not absolute; the privilege generally can be overcome by proof of malice. Conditional privileges serve to balance the individual's interests in reputation with the public's interest in the reporting of important public matters. Dairy Stores, supra, 104 N.J. at 137, 146-49 (recognizing fair comment privilege for matters of public interest), accord Dijkstra v. Westerink, 168 N.J. Super. 128, 134-36 (App. Div.) (holding citizens have qualified privilege to make statements to authorities for prevention and detection of crime), certif. denied, 81 N.J. 329 (1979).

Our courts have alternatively characterized the fair-report privilege as absolute, qualified, and a hybrid of the two. Compare Schwarz Bros., supra, 84 N.J.L. at 496 ("It is settled that the publication of fair reports of judicial proceedings are absolutely privileged"), and Rogers v. Courier Post, 2 N.J. 393, 402 (1949) ("A full, fair and accurate report of a judicial proceeding is qualifiedly privileged"), and Orso, supra, 284 N.J. Super. at 452 ("The fair-report privilege, if not an absolute privilege, is much broader than many other conditional privileges."). It seems to us that it is important to untangle that unruly skein because different classes of privilege carry with them distinct legal implications.

Several sections of the Restatement, on which our cases have relied (see, e.g., Dairy Stores, supra, 104 N.J. at 151; Costello, supra, 136 N.J. at 607; Darakjian, supra, 366 N.J. Super. at 245; Fortenbaugh, supra, 317 N.J. Super. at 448-49; Orso, supra, 284 N.J. Super. at 451-52), illustrate the point. Section 599 provides that "[o]ne who publishes defamatory matter concerning another

upon an occasion giving rise to a conditional privilege is subject to liability to the other if he abuses the privilege." Restatement, supra, § 599 (emphasis added). Section 600, in turn, defines abuse of the privilege as the publication of "false and defamatory matter concerning another" if the publisher "(a) knows the matter to be false, or (b) acts in reckless disregard as to its truth or falsity." Restatement, supra, § 600.[8]

However, section 600 specifically declares that it is inapplicable to the fair-report privilege. Restatement § 600 comment c. ("This section applies to the privileges set forth in §§ 594-598A. As indicated in § 599, comment c, the provisions of §§ 600-605A do not apply to the privileges expressed in §§ 611 and 612."). That comment recognizes that the fair-report privilege is distinct from traditional conditional privileges.

We adopted the principles of sections 599 and 600 of the Restatement in Dairy Stores, supra, 104 N.J. at 151, declaring that actual malice, which we denominated as "abuse of privilege," could defeat the conditional fair comment privilege. What we did not have occasion to address directly in Dairy Stores is the question presented here: whether the fair-report privilege is the kind of conditional privilege that is subject to defeat by actual malice.

Several of our appellate courts have reached disparate conclusions regarding that issue. In Ricciardi, for example, the panel held that once a court decides that a publication is full, fair, and accurate and thus subject to the fair-report privilege,

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[8] That is the "actual malice" standard of New York Times v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 707 (1964).

a plaintiff may nevertheless overcome the privilege by "demonstrating that the statements were published with actual malice[.]" Supra, 350 N.J. Super. at 471. Others have accepted both actual and common law malice[9] as sufficient to overcome the privilege. See, e.g., Sedore v. Recorder Publ'g Co., 315 N.J. Super. 137, 162 (App. Div. 1998) (citing Dairy Stores, supra, 104 N.J. at 151, for proposition that actual malice defeats privilege, and Molnar, supra, 193 N.J. Super. at 21, for proposition that common law malice defeats privilege). Still others identify the question as an unresolved one subject to vigorous debate among our courts. See, e.g., Fortenbaugh, supra, 317 N.J. Super. at 452 (stating "the kind of malice needed to defeat the fair-report privilege is . . . unsettled in New Jersey"); Orso, supra, 284 N.J. Super. at 455-56 (recognizing open question regarding whether fair-report privilege can be overcome by malice in light of holding in Dairy Stores "that knowledge of falsity or reckless disregard will defeat a qualified privilege, and the court's reference to § 600 of the Restatement, which, as previously discussed, excepts the fair-report privilege from the rest of the qualified privileges").

That same gap exists in Costello, which, in dictum, suggested that the fair-report privilege may be defeated by malice. Supra, 136 N.J. at 607. In spite of that statement, Costello cited the

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[9] Common law malice (also referred to as "malice in fact") is publication made with "spite, ill will, or a purpose to harm." Sack, supra, § 7.3.2.2.1. That was the standard in Restatement of Torts section 611 (1938), which declared the privilege lost if the publication is "made solely for the purpose of causing harm to the person defamed." That standard was eliminated in the present version. Lavin v. New York News, Inc., 757 F.2d 1416, 1421 (3d Cir. 1985).

Restatement section 611, which is plainly contrary. Indeed, comment a to section 611 provides:

> a. Character of privilege. The privilege of the publication of reports of defamatory statements covered in this Section is not an absolute privilege. It is, however, somewhat broader in its scope than the conditional privileges covered in §§ 594 to 598A. The basis of this privilege is the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings. The privilege is therefore one of general publication and is not limited to publication to any person or group of persons. For the same reason the privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false. Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding. (On this see Comment f).

That is our view as well. To us, the fair-report privilege is neither fish nor fowl -- that is, it is neither purely absolute nor purely conditional. Rather, it is a hybrid; it is conditional insofar as it

cannot attach unless the report is full, fair, and accurate. Once that condition is met, the privilege becomes absolute and cannot be defeated. The publisher's failure to do what is necessary to make the report full, fair, and accurate is the only relevant inquiry. See, e.g., Green Acres Trust, supra, 688 P.2d 617; Ortega, supra, 510 So. 2d 972; Jones v. Taibbi, 512 N.E.2d 260 (Mass. 1987). Indeed, it is that failure that satisfies the fault standard imposed by the United States Supreme Court in Gertz, supra, 418 U.S. at 347-48, 94 S. Ct. at 3010-11, 41 L. Ed. 2d at 809-10 (holding publishers generally not liable for defamatory statements in absence of negligence).

That is the view of most scholars as well. See, e.g., Sack, supra, § 7.3.2.2.1; David Marburger, Note, More Protection for the Press: The Third Circuit Expands the Fair Report Privilege, 43 U. Pitt. L. Rev. 1143, 1160 (1982). They consider the fair-report privilege as different from other conditional privileges and conclude that it is lost only by a "showing of fault in failing to do what is reasonably necessary to insure that the report is accurate and complete or a fair abridgement." Restatement, supra, § 611 comment b. As long as the report is fair and accurate, "both the publication's truth and the publisher's knowledge of its truth or motivation for publishing it are irrelevant." Sack, supra, § 7.3.2.2.1. "Under this 'modern' trend of the law, the accurate reporting of judicial proceedings results in complete immunity," regardless of the knowledge or motive of the publisher. Read, supra, 474 A.2d at 121 (citing Boston Mut. Life Ins. v. Varone, 303 F.2d 155 (1st Cir. 1962)); see also Pittman v. Gannett River States Publ'g Corp., 836 F. Supp. 377, 384 (S.D. Miss. 1993); Metcalf v. KFOR-TV, Inc., 828 F.

Supp. 1515, 1526 (W.D. Okla. 1992); Ricci, supra, 574 F. Supp. at 1567; Green Acres Trust, supra, 688 P.2d at 626; Butler, supra, 49 S.W.3d at 120; Ortega, supra, 510 So.2d at 975-76; Lawton v. Ga. Television Co., 456 S.E.2d 274, 277 (Ga. Ct. App. 1995); Solaia Tech., supra, 852 N.E.2d at 843; Butcher v. SEM Newspapers, Inc., 475 N.W.2d 380, 382 (Mich. Ct. App.), appeal denied, 478 N.W.2d 169 (Mich. 1991); Moreno v. Crookston Times Printing Co., 610 N.W.2d 321, 333 (Minn. 2000); Furgeson v. Clausen, 785 P.2d 242, 245 (N.M. 1989); Freeze Right Refrigeration and Air Conditioning Servs., Inc. v. City of New York, 475 N.Y.S.2d 383, 388-89 (App. Div. 1984); Wright, supra, 873 P.2d 983 (holding fair and accurate/true/honest report absolutely privileged). But see Stem v. Gannett Satellite Info. Network, 866 F. Supp. 355, 360 (W.D. Tenn. 1994) (holding actual malice defeats the privilege).

Our conclusion to adopt the modern view is informed by the uniqueness of the fair-report privilege, which derives from the official nature and public concern over what is being reported. An accurate record of those proceedings is the very information a citizen needs to carry out his role in a democracy as supervisor of the government, and indeed is what he could obtain if he miraculously were capable of attending every single public proceeding every single day. Conveying to the citizenry what has really been said or done in a public or judicial forum is the value that the fair-report privilege was intended to protect. Indeed as one scholar has noted:

> The interests served by a report privilege could not be protected adequately if the publisher's view

> of the validity of the statement reported were allowed to form the basis of civil liability. With respect to reports of public, official statements and proceedings, the public's supervisory rights over government require that the people have as full a view as possible of the conduct of public officials and the rules and policies that govern the conduct of public affairs. A rule requiring deletion of material from reports of governmental proceedings based on the view of the reporter about the falsity of the statements made in the course of those proceedings would deny the people access to full reports of the operations of government.
>
> [Kathryn D. Sowle, Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report, 54 N.Y.U. L. Rev. 469, 541-42 (1979).]

Once that is understood, it is clear that so long as the publisher fully, fairly, and accurately reports the contents of a public proceeding, he has done what is necessary and is immune from a suit for defamation based on false statements made, not by him, but by the participants in the proceeding.

Although the truth or falsity of the information reported on may later be established, it is not the focus of the fair-report privilege. Rather, fair report is intended to increase the flow of public information about what is truly happening in our public and quasi-public institutions, no more and no less. Thus, it is satisfied where the publisher fully, fairly, and accurately reports on what is in the proceedings, including pleadings. See Marburger, supra, 43 U. Pitt. L. Rev. at 1160. That said, plaintiff in this case may not advance a challenge based on malice to the privileged report of the bankruptcy complaint, which we have declared to be full, fair, and accurate.

VI.

We have thus far focused solely on the statements based on the bankruptcy complaint to the effect that plaintiff "stole money" from NorVergence. However, that is not the only claim advanced by plaintiff, who also contends that he was defamed by the reports asserting that he and his father "started a Kenilworth business last year called Charity Snack which also went belly-up." Because that statement, which at least impliedly suggests a lack of business skill, was not derived from the bankruptcy complaint, it is not insulated by the fair-report privilege.

Thus, plaintiff may proceed with his suit based on that issue. That said, the question that arises is what burden plaintiff bears in proving his defamation case in respect of that claim. Plaintiff argues in his cross-petition that because he is a private individual who has not placed himself in the eye of a public controversy, the Appellate Division erred in applying the actual malice standard to him. To be sure, the actual malice standard can, in proper

circumstances, apply to a private citizen. See Sisler v. Gannett Co., 104 N.J. 256, 279 (1986) (applying actual malice standard to private citizen involved in regulated industry who should have been aware that his actions implicated matters of public concern and bore "attendant risk of publicity"). In determining what constitutes speech involving a matter of public concern, we apply the "content, form and context" standard of Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761, 105 S. Ct. 2939, 2946, 86 L. Ed. 2d 593, 604 (1985) (citation omitted) and consider, as well, "the identity of the speaker and the targeted audience." Senna, supra, 196 N.J. at 492-93 (citing Dun & Bradstreet, supra, 472 U.S. at 761-63, 105 S. Ct. at 2947, 86 L. Ed. 2d at 604-05). Where the speaker is disinterested, as is generally the case with the media, enhanced protections inhere if the publication touches on matters of public concern. Id. at 495.

In this case we need not perseverate further over the issue of what standard applies because, as the Appellate Division declared, the record regarding Charity Snack is an inadequate vehicle for such a determination: "We lastly observe that because the matter has not been the subject of discussion in the trial court, it is not presently appropriate to ascertain whether the actual malice standard should apply to this aspect of the claim." Salzano, supra, 403 N.J. Super. at 426. We think the panel was correct in recognizing the paucity of the record regarding the failure of the Kenilworth business and in remanding the issue to the trial judge "to be more fully developed." Ibid. In that proceeding the trial judge should apply the standard set out in Senna

and may address any other issues raised by either party specific to the Charity Snack claim.

VII.

The judgment of the Appellate Division is affirmed in part and reversed in part. We affirm the Appellate Division's decision to permit plaintiff's case to proceed based on the Charity Snack allegation. We reverse the Appellate Division's conclusion that the initial pleadings exception to the fair-report privilege insulated the report of the NorVergence bankruptcy complaint from dismissal. The members of the Court being equally divided on the fairness and accuracy of the report of the NorVergence bankruptcy complaint, the Appellate Division's holding that the report was full, fair, and accurate is affirmed.

JUSTICES ALBIN and WALLACE join in JUSTICE LONG's opinion. JUSTICE HOENS filed a separate opinion, concurring in part and dissenting in part, in which JUSTICES LaVECCHIA and RIVERA-SOTO join. CHIEF JUSTICE RABNER did not participate.

SUPREME COURT OF NEW JERSEY
A-78/79 September Term 2008

THOMAS JOHN SALZANO,

Plaintiff-Respondent and Cross-Appellant,

v.

NORTH JERSEY MEDIA GROUP INC., d/b/a THE RECORD, NORTH JERSEY.COM, MALCOLM BORG, STEPHEN A. BORG, MARTHA MCKAY, and JONATHAN MARKEY,

Defendants-Appellants and Cross-Respondents,

and

GLEN RIDGE VOICE, INC. and FRANK A. ORECHIO,

Defendants.

JUSTICE HOENS, concurring in part and dissenting in part.

I concur in the majority's conclusion that the time has come for us to reject the initial pleadings exception to the fair reporting privilege and I concur in the majority's persuasive and thorough explanation of why that exception has no place in our jurisprudence. Moreover, I concur in the majority's conclusion that once it has been determined that the fair reporting privilege applies, it becomes an absolute, rather than a qualified one.

I dissent, however, from the majority's analysis of the application of the fair reporting privilege in this case because I cannot agree with the majority's conclusion that the news articles that are the focus of this litigation meet the test of "full, fair and accurate." Instead, in my view, those news reports fall short of the standard that we have traditionally applied, with the result that they should not be cloaked in the protection that the privilege affords.

Much of the majority's approach to the meaning of "full, fair and accurate" is not subject to serious debate. Its reliance, for example, on this Court's opinion in Costello v. Ocean County Observer, 136 N.J. 594, 607-09 (1994), including that decision's references to the Restatement test, see Restatement (Second) of Torts § 611 comment f (1976) (describing accuracy and fairness requirements of fair reporting privilege), ante at ___ (slip op. at 29-32), is hardly controversial. But in explaining the meaning of the "full, fair and accurate" articulation of the standard that serves as the yardstick against which the privilege-worthiness of a news report will be measured, and in applying that test in this matter, the majority has overlooked the significant shortcomings of these news reports.

Longstanding decisions of this Court, together with opinions on the question that have been published by our appellate courts, and by the federal and other state courts, identify a series of fundamental and widely accepted principles that inform courts in their decisions about whether a particular news report will be privileged. We do not demand that a report be "exact in every immaterial detail," but instead require that it be "a substantially correct account." Costello, supra, 136 N.J. at 607 (quoting Restatement (Second) of Torts, supra, § 611 comment f); see also Orso v. Goldberg, 284 N.J. Super. 446, 454 (App. Div. 1995) (concluding privilege will apply to news report that conveys "a substantially correct account," even if it is not "exact in every detail").

We have not required, therefore, that a news report merely reprint the words of a complaint filed in court, or that it only quote verbatim what has been said in a public forum; we have recognized that some inaccuracies may be reported without loss of the privilege. In those circumstances, the threshold question is whether the factual inaccuracy is significant or substantial, because if it is not, the mere fact of an inaccuracy will not void the privilege. Thus, for example, a news article that referred to a particular court order as the source of information, although inaccurate, was deemed to be of no consequence because the information came from a different document contained in the same court file. Sedore v. Recorder Publ'g Co., 315 N.J. Super. 137, 159 (App. Div. 1998). Similarly, a news report that takes care to present both sides of a story will find refuge within the protective scope of the privilege, in

spite of including some otherwise objectionable language. Orso, supra, 284 N.J. Super. at 455.

Nonetheless, this Court has been careful to make it clear that the privilege is not a license for sensationalizing and does not authorize or protect false or misleading reports. See Costello, supra, 136 N.J. at 609-10. That is, the article may not be edited or have information deleted in such a way as to become misleading, and factual omissions or facts that are "misplaced" so as to "convey an erroneous impression" to the reader will not meet the test of fairness. Id. at 608 (quoting Restatement (Second) of Torts, supra, § 611 comment f). As a result, if a publication creates false innuendo from the facts as they are reported, see Romaine v. Kallinger, 109 N.J. 282, 293 (1988) (assessing fair inference to be drawn from larger context of book chapter), or if a news account of a trial court proceeding is written so as to hold up a person to ridicule, Bock v. Plainfield Courier-News, 45 N.J. Super. 302, 309-10 (App. Div. 1957), or if it includes "distorted accounts" of what occurred, id. at 307, or if old allegations that have already been discredited are presented as if they are still current and unresolved, Fortenbaugh v. N.J. Press, Inc., 317 N.J. Super. 439, 449-51 (App. Div.), certif. denied, 160 N.J. 91 (1999); Reilly v. Gillen, 176 N.J. Super. 321, 327 (App. Div. 1980), the report will not meet the test of "full, fair and accurate" needed to invoke the protection of the privilege.

Our view, and that of our Appellate Division, is squarely in accord with the analytical framework used by the federal courts as well as the courts in our sister states. Minor variations in wording, as between an arrest report and the news account, will not vitiate the privilege, see Hegwood v. Cmty. First

Holdings, Inc., 546 F. Supp. 2d 363, 367 (S.D. Miss. 2008); Pittman v. Gannett River States Publ'g Corp., 836 F. Supp. 377, 384 (S.D. Miss. 1993), but distortions or use of facts that have been rearranged to create false impressions will, see Lawton v. Ga. Television Co., 456 S.E.2d 274, 277 (Ga. Ct. App. 1995).

Applying these principles, the minor inaccuracies in the news reports before this Court relating to the specific sum sought to be returned to the bankrupt estate by the Trustee, although factually erroneous, are too inconsequential to matter. That is, referring to the sum in issue as $500,000 or even as "$1/2 MM" when the true amount was $469,995.84, is the kind of minor deviation from precise factual accuracy that would not render the account inaccurate in the sense required for loss of the privilege. Similarly, including a reference to plaintiff's father as the "mastermind behind NorVergence," although apparently not derived directly from the Trustee's complaint, would not suffice to take the news accounts outside of the privilege. Were those the only deviations from the court filing by the Trustee, I would join my colleagues in their analysis and in their conclusion that the news reports were "full, fair and accurate." However, those are not the only inaccuracies in these news reports.

Rather, the real inaccuracy, and one that in my view takes the news accounts outside of the privilege, lies in the use of variations of the verb "steal" both in the headlines and in the body of the reports. Analyzing that word choice requires consideration of the role that headlines play in the "full, fair and accurate" framework, as well as the

precision with which legal terms must be utilized by news reporters. More to the point, it requires us to consider the overarching question of how we determine whether the "sting" of the news report matches the "sting" of the truth. See, e.g., Lawrence v. Bauer Publ'g & Printing, 89 N.J. 451, 460 (holding that in defamation action, defense of truth requires that truth be "as broad as the defamatory imputation or 'sting' of the statement"), cert. denied, 459 U.S. 999, 103 S. Ct. 358, 74 L. Ed. 2d 395 (1982).

Headlines, in general, present unique challenges in the determination of whether a news report is "full, fair and accurate." We have commented on the impact that a misleading headline has on the "full, fair and accurate" analysis because of its capacity to create a focus for the article that may be misleading. See Costello, supra, 136 N.J. at 609-10. Even though headlines surely have the capacity to create a greater impact on the reader, however, a news account should be considered as a whole. See Molin v. Trentonian, 297 N.J. Super. 153, 157 (App. Div.) (noting that majority of jurisdictions support rule that headlines "be construed in conjunction with their accompanying articles"), certif. denied, 152 N.J. 190 (1997), cert. denied, 525 U.S. 904, 119 S. Ct. 239, 142 L. Ed. 2d 196 (1998). As a result, if the only objectionable implication flows from the few words chosen for large print headlines, the privilege will still apply. Ibid. Similarly, if the inaccuracy created by the headline is immediately corrected in the opening sentence of the report itself, the news report, when evaluated as a whole, may be entitled to be protected by the privilege. See McGhee v. Newspaper

Holdings, Inc., 115 P.3d 896, 898-99 (Okla. Civ. App. 2005).

News reports that utilize legal terminology, likewise, have been accorded separate evaluation. The majority, for example, relies on a pair of federal court decisions as part of analyzing the role to be played by a news report's use of legal terms. Ante at ___ (slip op. at 30-32); see Riley v. Harr, 292 F.3d 282, 296 (1st Cir. 2002) (utilizing "rough-and-ready summary" standard to evaluate fairness); Ricci v. Venture Magazine, Inc., 574 F. Supp. 1563, 1567 (D. Mass. 1983) (concluding that journalists need not utilize "technically precise language" in describing courtroom proceedings; applying "common sense standard of expected lay interpretation of media reports of trials").

Although we have not previously so held, other courts have concluded that the use of technically inaccurate legal terms will not support relief, as long as the report itself remains full, fair and accurate. See, e.g., Orr v. Argus-Press Co., 586 F.2d 1108, 1112-13 (6th Cir. 1978) (concluding that terms "swindle" and "phony" used to describe facts asserted in SEC complaint were "ill chosen" but that other factual descriptions undermined false inferences), cert. denied, 440 U.S. 960, 99 S. Ct. 1502, 59 L. Ed. 2d 773 (1979); Lambert v. Providence Journal Co., 508 F.2d 656, 658-59 (1st Cir.) (applying Rhode Island law; concluding that describing killing as murder was not misleading), cert. denied, 423 U.S. 828, 96 S. Ct. 45, 46 L. Ed. 2d 45 (1975); Koniak v. Heritage Newspapers Inc., 499 N.W.2d 346, 348-49 (Mich. Ct. App.) (rejecting claim based on description of nolo contendere plea as "willing to

accept the consequences of the conviction"), appeal denied, 508 N.W.2d 500 (Mich. 1993).

The test to be applied in the evaluation of whether a news report is "full, fair and accurate" uses common sense and objective terms, asking whether the "sting" of the report matches that of the event or the pleading being reported upon. See Lawrence, supra, 89 N.J. at 460. Other courts have explained the meaning of this test to be whether the report "produces the same effect on the mind of the recipient which the precise truth would have produced." Yohe v. Nugent, 321 F.3d 35, 43 (1st Cir. 2003) (applying Massachusetts law; quoting ELM Med. Lab., Inc. v. RKO Gen., Inc., 532 N.E.2d 675, 678 (Mass. 1989)).

In engaging in this evaluation, however, courts have focused on what it was about the truth that produced a "sting" and have compared that to the effect produced by the challenged news account. Thus, for example, a news report that inaccurately referred to a defendant being accused of thirty to fifty acts of sexual assault on a family member, in place of the eight identified in the charging instrument, was privileged. Koniak, supra, 499 N.W.2d at 348. Although plainly inaccurate, the Michigan court pointed out that "the sting" arising from the charge of sexual assault was the same, "whether plaintiff assaulted his stepdaughter once, eight times, or thirty times." Ibid. Similarly, where a news report revealed that its subject had been convicted of homicide, had served four years, and was now employed as a school bus driver, the fact that she had only served two years was irrelevant. Woodard v. Sunbeam Television Corp., 616 So. 2d 501, 503 (Fla. Dist. Ct. App. 1993). The article's

"sting" arose from the fact that someone who had been convicted of a homicide was working with children in the community; the length of the sentence served was immaterial when evaluating the "stinging" effect that the truth would have had. Ibid.

As part of the basis for its conclusion that the news articles in this appeal were sufficiently "full, fair and accurate" to merit protection, the majority relies on dictionary definitions of the word "steal" as support for the common sense understanding of the articles and the "sting" that they inflicted as compared to the truth. Ante at ___ (slip op. at 33-34). But that approach actually misses the point, because even the definitions quoted demonstrate that the "sting" of that word choice is far harsher than the truth, and that choosing that value-laden word, in the end, created a news report that was both unfair and inaccurate.

The definitions of the word "steal" that are used by the majority each carry clearly pejorative implications of a criminal act, ante at ___ (slip op. at 33). Numerous other definitions of the word "steal" also explain that the word conveys a strongly negative message. "Steal, like misappropriate, is generally a broader term than embezzle; it has the same meaning as misappropriate, but much stronger negative connotations." A Dictionary of Modern Legal Usage 311 (2d ed. 2001) (emphasis omitted). "Steal [is defined to mean]: 1. To take (personal property) illegally with the intent to keep it unlawfully." Black's Law Dictionary 1453 (8th ed. 2004). To steal, when used as a verb, means "to take and carry away feloniously and usu[ally] unobserved: take or appropriate without right or leave and with intent to keep or make use of

wrongfully." Webster's Third New International Dictionary 2232 (1976). Each of these definitions, therefore, carries with it the clear connotation of a crime, together with its attendant evil-minded mens rea. None of that is faithful to the actual allegations made in the Bankruptcy Court by the Trustee.

In traditional defamation law, attributing a criminal act to someone is slander per se, see Romaine, supra, 109 N.J. at 291 ("Certain kinds of statements . . . are considered defamatory as a matter of law. A prime example is the false attribution of criminality."), and innuendo that insinuates guilt of wrongdoing will not be protected as fair, see Fortenbaugh, supra, 317 N.J. Super. at 451 (citing Reilly, supra, 176 N.J. Super. at 327). Historically, false accusations of a crime or false insinuations that one has committed a criminal act are considered to be different from other defamatory statements. At common law, for example, it was well established that such statements were actionable without proof of special damages, because they were regarded to be slander per se. Gnapinsky v. Goldyn, 23 N.J. 243, 250 (1957); Johnson v. Shields, 25 N.J.L. 116, 118-19 (1855)).

Although we have, in another context, noted that some legal scholars have voiced criticism in general of the slander per se rule, see, e.g., Ward v. Zelikovsky, 136 N.J. 516, 541 (1994), it retains vitality, including, in particular, as it relates to the false imputation of a criminal act. See, e.g., Jobes v. Evangelista, 369 N.J. Super. 384, 397 (App. Div.) (concluding charge to jury on presumed damages was appropriate based on falsely-filed criminal charges), certif. denied, 180 N.J. 457 (2004); Ricciardi v. Weber, 350 N.J. Super. 453, 475-76 (App.

Div. 2002) (stating rule; concluding that accusation of sexual harassment was not imputation of criminal act required for slander per se), certif. denied, 175 N.J. 433 (2003); Biondi v. Nassimos, 300 N.J. Super. 148, 156-57 (App. Div. 1997) (adopting strict definition of criminal offense capable of constituting slander per se; relying on definition contained in Restatement (Second) of Torts § 571 comment c (1977)).

This long common law history demonstrates that some false accusations, including false accusations of a crime, are so obviously damaging to one's reputation that no proof of special damages is required in order for an award to be appropriate. Words of that type carry unique and plainly pejorative connotations entitling their target to relief simply because they have been uttered. By implication, therefore, words like that convey a special sting, making them worthy of our careful scrutiny if we are to agree that they nonetheless will be cloaked in privilege.

Because in common understanding the word "steal" describes a criminal act, the headline and the opening sentence conveyed, unmistakably, the message that the subject of the story was being prosecuted for a crime. That, in turn, surely conjured up in the mind of any objective and reasonable reader the mental image of the now all-too-familiar "perp walk" on the evening news that is sure to follow. Joining that image with an entirely accurate reference to the United States Trustee compounds rather than blunts the unfair message, for it brings to mind visions of the awesome power of the Federal Government as the accuser with all that that entails. See, e.g., Schiavone Constr. Co. v.

Time, Inc., 847 F.2d 1069, 1088 (3d Cir. 1988) (concluding that deletion of exculpatory language from report while "thrust of the story" remained intact enhanced potential for unfairness and distortion).

Polite parsing of the legal nuances as between stealing and a civil complaint charging that one has diverted assets of a bankrupt estate cannot overcome the reality that the choice of the word "steal" inflicts a far greater sting. To regard that as full, fair and accurate and to cloak it with absolute immunity rewards a choice made to sensationalize stories rather than report them.

Whether we see news reporters as the eyes of the public or as our agents on the scene, that is, as surrogates who see events or read documents in our place, see Costello, supra, 136 N.J. at 607 (quoting Prosser and Keeton on Torts § 115 (5th ed. 1984)), and whether we regard the fair reporting privilege as being supported by the alternative rationales of "public supervision" or serving the public's interest in being informed, see Sedore, supra, 315 N.J. Super. at 152 (quoting Medico v. Time, Inc., 643 F.2d 134, 141-42 (3d Cir.), cert. denied, 454 U.S. 836, 102 S. Ct. 139, 70 L. Ed. 2d 116 (1981)), in the end, the news report simply calls matters to the attention of a wider audience of people who would otherwise have been privileged to hear or see them first-hand. We therefore protect the press from the threat of suit that would otherwise be permissible for a republication of a slanderous statement. For me, however, part and parcel of the privilege must be that the news entity acts as a neutral filter of the information, reporting it as blandly or as harshly as it would appear to us had we read, heard, or seen it

ourselves. That is not to imply that the fair reporting privilege does or should require a mere parroting or duplication of information, but that the report, as a whole, is full, fair and accurate.

The privilege itself has roots not only in the First Amendment freedom of the press and our cherished ideals relating to a fully informed public, but, in modern times, has strong ties to our desire to foster openness and transparency in all aspects of our government. But the price to be paid for that shield of immunity must be our insistence that news organizations faithfully, carefully, and accurately perform their role and that they find no refuge in the privilege when the words that they have chosen inflict a greater sting than the truth.

This news story has all of the elements that cry out for this Court to pull aside the cloak of privilege, for it misleads by innuendo, insinuates criminal prosecutions are afoot, and implies by distortion. It does not qualify as a news report that is full, fair and accurate and I therefore cannot agree that it is worthy of the protection that follows the invocation of an absolute privilege. Rather, I would reverse the Appellate Division's conclusion that the news reports were full, fair and accurate and would conclude instead that, in their entirety, the news reports fall outside the protective scope of the privilege. I would therefore expand the remand ordered by the majority as a remedy for the assertions relating to plaintiff's other business, Charity Snack, to include the news reports as a whole.

JUSTICES LaVECCHIA and RIVERA-SOTO join in this opinion.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION
SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-6715-06T1

THOMAS JOHN SALZANO,

Plaintiff-Appellant,

v.

NORTH JERSEY MEDIA GROUP, INC., d/b/a THE RECORD, NORTHJERSEY.COM, MALCOLM BORG, STEPHEN A. BORG, MARTHA McKAY, and JONATHAN MARKEY,

Defendants-Respondents,

and

GLEN RIDGE VOICE, INC., and FRANK A. ORECHIO,

Defendants.

APPROVED FOR PUBLICATION

November 12, 2008

APPELLATE DIVISION

Argued October 16, 2008 – Decided November 12, 2008

Before Judges Cuff, Fisher and C.L. Miniman.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-1429-07.

Thomas John Salzano, appellant, argued the cause pro se.

Bruce S. Rosen argued the cause for respondents (McCusker, Anselmi, Rosen & Carvelli, attorneys; Mr. Rosen, on the brief).

The opinion of the court was delivered by

FISHER, J.A.D.

In this appeal, we reverse the dismissal of the complaint because defendants were not privileged to republish alleged defamatory statements within a bankruptcy court complaint and, absent the shield of the fair report privilege, they failed to demonstrate the statements were true or nondefamatory. We also hold that, although a private person, plaintiff was embroiled in a public matter and must be held to the actual malice standard, but we also hold that he should be permitted to amend his complaint.

I

The complaint filed in this matter by plaintiff Thomas John Salzano (Salzano) was triggered by articles published in two newspapers, The Record and The Glen Ridge Voice, and placed on two websites, NorthJersey.com and LeasingNews.org. These articles reported on a complaint, which was filed by the trustee for the bankruptcy estate of NorVergence, Inc., against Salzano on March 1, 2006, in the United States Bankruptcy Court for the District of New

Jersey. The complaint in this adversary proceeding in the NorVergence bankruptcy matter (the bankruptcy complaint) alleged that Salzano, the son of Thomas N. Salzano, who was NorVergence's former chief managing officer, "unlawfully diverted, converted and misappropriated" NorVergence's funds "for his own personal benefit."

Specifically, the trustee claimed that, in July 2003, Salzano negotiated two NorVergence checks in the approximate amount of $200,000 for the purchase of a residence in Glen Ridge. The trustee also alleged that Salzano charged $268,795.84 in "personal expenses, such as outings to bars and clubs, clothing and other personal expenses, between November 25, 2002 and March 24, 2004" against NorVergence's American Express Business Gold/Platinum account, and that other unspecified credit cards were similarly misused.

The bankruptcy complaint consisted of five counts. The first two counts urged the application of federal and state law in seeking avoidance of what the trustee claimed were fraudulent conveyances made by NorVergence to Salzano. The third count alleged conversion, the fourth count claimed that Salzano was unjustly enriched, and the fifth count sought the imposition of a constructive trust on Salzano's Glen Ridge property.

On March 2, 2006, The Record published an article with the headline "Man accused of stealing $500,000 for high living." A smaller headline declared that "NorVergence funds were taken," and the beginning of the article, authored by defendant Martha McKay, stated:

> The son of the mastermind behind

> NorVergence, a bankrupt Newark telecommunications firm, allegedly stole close to $500,000 from the company, using the money to pay for drinks, trips to area clubs and for a five-bedroom Glen Ridge house, according to court papers filed Wednesday in U.S. Bankruptcy Court in Newark.
>
> Thomas John Salzano, son of Thomas N. Salzano, the chief management officer of bankrupt NorVergence, was accused of using two company checks -- one in the amount of $61,200 dated July 1, 2003, and another for $140,000 dated July 29, 2003 -- to help pay for "the purchase of his personal residence located [in] Glen Ridge," the papers said.

In addition, the article recounted other aspects of the bankruptcy complaint, and synopsized some of the events that led NorVergence into bankruptcy, with a brief description of the losses allegedly sustained by NorVergence employees, investors and customers as a result. The article also indicated that Salzano and his

father "started a Kenilworth business last year called Charity Snack, which also went belly-up."

This same article was posted on March 2, 2006 by defendant at NorthJersey.com. On March 9, 2006, the article was included in The Glen Ridge Voice under the headline: "Argyle residence allegedly bought with stolen funds," and was also posted at LeasingNews.org, under the headline "NorVergence BK charges Salzano son stealing $1/2 MM."

As a result of these articles, Salzano filed suit in the Law Division against defendants North Jersey Media Group, Inc. (North Jersey), the publisher of The Record; NorthJersey.com; Malcolm Borg, the chief executive officer of North Jersey; Jonathan Markey, the president of North Jersey; Stephen A. Borg, the editor/publisher of The Record and NorthJersey.com; Martha McKay, a staff reporter for The Record; Glen Ridge Voice, Inc., which was alleged to be the publisher of The Glen Ridge Voice; and Frank A. Orechio, the alleged president of The Glen Ridge Voice. In his complaint, Salzano asserts that he became "unwittingly embroiled" in the bankruptcy proceedings through the trustee's assertion of "baseless and unsupported" claims against him, which these defendants republished "intentionally, maliciously, and with reckless and/or negligent disregard of the truth." He also claims that defendants added far more sinister innuendo to the trustee's claims by referring to the bankruptcy complaint as alleging that Salzano "stole" from NorVergence, thereby, in Salzano's words, "egregiously infer[ring] criminal implications and immorality, which is completely and factually inaccurate, false and libelous." Based on these and other allegations, Salzano pled seven counts in his

complaint, which he labeled: defamation-libel, gross negligence, invasion of privacy (public disclosure of private facts), invasion of privacy (false light invasion), malice, negligent infliction of emotional distress, and intentional infliction of emotional distress.

All defendants except Glen Ridge Voice Inc. and Frank A. Orechio[1] moved for a dismissal of the complaint for failing to state a claim upon which relief may be granted. R. 4:6-2(e). Even though less than all the named defendants moved for dismissal, the judge entered a final order that dismissed the complaint as to all defendants. The judge's entire oral opinion states:

> Look, I'm going to grant the motion as -- with regard to the named defendants in the motion for several reasons. One is I do not feel that the defendant -- that the plaintiff's position

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[1]North Jersey acknowledged that it publishes The Record, and that The Glen Ridge Voice and NorthJersey.com are its "wholly-owned subsidiaries." North Jersey also claimed that the individual defendants were not served with process, that Glen Ridge Voice Inc. and Frank A. Orechio, the former owners of The Glen Ridge Voice, also were not served with process, and that "it is believed Mr. Orechio is deceased." In light of our disposition of the appeal, we need not now determine how the parties are related or responsible for the articles in question or whether all have been served with process. Those issues, to the extent still necessary, may be considered in the trial court following today's judgment.

> with regard to the statements is a reasonable interpretation of that and that, in any case, the -- this matter is subject to the heightened standard of malice and that there is in fact no reasonable showing of any malice. I can understand why plaintiff is upset with regard to the reporting as not being totally, 100 percent accurate. But that's not the standard that we apply. And based on the arguments presented I find that this matter -- that the complaint does fail to state a cause of action in defamation with regard to these particular defendants. And I so rule.

Although the judge's opinion fails to provide an adequate explanation for his disposition of the many issues presented, we discern from the judge's statement -- that the moving defendants (hereafter "defendants") were not required to be "totally, 100 percent accurate" -- that the judge applied the fair report privilege in dismissing the complaint. The judge's opinion also suggests that he found as an alternative basis for dismissal what he viewed as Salzano's imperfect allegation of actual malice. We

find that the judge mistakenly dismissed the complaint and reverse.

II

Although many arguments have been presented, we need not consider all of them because we conclude that reversal is mandated because (a) absent application of the fair report privilege, defendants were required -- and failed -- to demonstrate that the statements they republished about Salzano were made by the trustee and are substantively true; (b) because the fair report privilege does not apply to defendants' reports about the bankruptcy complaint; and (c) because, even though Salzano was required to plead and must ultimately prove actual malice in this action, he should first be provided with an opportunity to file an amended complaint.[2]

A

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[2]The parties have raised numerous other issues on appeal that were not addressed in the trial judge's brief oral decision. For example, the parties have argued whether Salzano's claims of an invasion of privacy, and negligent and intentional infliction of emotional distress, may survive the dismissal of the defamation claim. And the individual defendants, other than Orechio, argue that the dismissal may be upheld because the court lacks personal jurisdiction over them due to the alleged lack of service of process. Because our resolution of the defamation issues requires a reversal of the order of dismissal, we need not address these other issues, which the parties may continue to pursue in the trial court.

Defendants have argued that we need not consider whether or to what extent the fair report privilege may apply to their articles. Defendants are certainly correct that, absent application of the fair report privilege, the matter must be analyzed by determining whether the statements are false and, if so, whether they are susceptible to a defamatory meaning, Romaine v. Kallinger, 109 N.J. 282, 290 (1988), but they then confuse these requirements with the principles of the fair report privilege. In other words, in asserting the truth of the statements contained in the article, defendants rely upon the alleged accuracy of their report of the bankruptcy complaint without attempting to demonstrate the truth of the trustee's allegations.

To obtain dismissal -- absent a privilege to republish a defamatory statement -- "the reporter or newspaper must verify that a statement was spoken, and also that the substance of the statement is true." Costello v. Ocean County Observer, 136 N.J. 594, 606 (1994) (emphasis added). Here, absent the benefit of the fair report privilege, defendants are left to argue that the trustee said that Salzano stole money and that there is truth in what the trustee asserted. In other words, when a defendant publishes "that a third person stated that plaintiff has committed a crime, it is no justification that the third party did in fact make that statement." Lawrence v. Bauer Publ'g & Printing Ltd., 89 N.J. 451, 461, cert. denied, 459 U.S. 999, 103 S. Ct. 358, 74 L. Ed. 2d 395 (1982); see also Fortenbaugh v. N.J. Press, Inc., 317 N.J. Super. 439, 453-54 (App. Div.), certif. denied, 160 N.J. 91 (1999). The record does not support a finding that Salzano stole money or even that he was the recipient of a fraudulent conveyance. Defendants' arguments

address only the first half of what these authorities say must be demonstrated; the record is silent on the second half of the equation.

There is also no merit in defendants' argument that saying a person is a thief or is the recipient of stolen funds, without a suggestion of a past or present criminal investigation or prosecution, is not actionable without proof of damage to a person's reputation. The law is to the contrary. See Prosser and Keeton on Torts § 112 at 788-89 (5th ed. 1984). That is, defendants argue that the entire context of the articles -- despite the summary in the headline that Salzano "stole money" -- indicates only that Salzano was the target of a civil suit regarding his alleged receipt of NorVergence assets, and that there is no hint or suggestion in the article that Salzano had been or would be criminally prosecuted. We find no substance in the argument that there is no defamatory meaning associated with the reference to a person as a thief or the recipient of stolen funds absent an indication that law enforcement authorities are involved in proving that fact or that the target of the article has been convicted of such a crime. Either assertion suggests that the target of the comments has engaged in a criminal act, N.J.S.A. 2C:20-7 (receiving stolen property), or an act of moral turpitude regardless of whether the person is the subject of a criminal investigation or has been formally charged with a crime. Restatement (Second) of Torts § 571 (1977) ("One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be (a) punishable by imprisonment

in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude").

We thus reject defendants' argument that the order of dismissal, insofar as it is based upon the alleged accuracy of their report on the bankruptcy complaint, can be sustained without resort to the fair report privilege.

B

In discussing the fair report privilege in their submissions in this court, defendants argue that the trial judge "never addressed" the fair report privilege in dismissing the complaint. If that is true, we fail to understand how that aids defendants' position. However, we discern from the judge's oral decision that he found an absence of a false and defamatory meaning because defendants, in his view, accurately reported what the bankruptcy trustee alleged -- a holding that would presuppose the judge's application of the fair report privilege. In any event, regardless of whether the judge actually relied upon it, we deem it appropriate to examine whether the fair report privilege is a ground upon which dismissal may fairly rest.

Defendants essentially argue that they did not defame Salzano because they truthfully recounted what the trustee alleged. Whether that argument should be sustained requires consideration (1) of the purpose and scope of the fair report privilege, (2) whether defendants' report of the bankruptcy complaint was both accurate and fair, and (3) whether the fair report privilege applies to reports about the contents of initial pleadings.

(1)

The fair report privilege was thoroughly examined in Costello, supra, 136 N.J. at 606, where the Court summarized the privilege's legal underpinnings and the tension between competing policies it evokes in the following way:

> "The law of defamation embodies the important public policy that individuals should generally be free to enjoy their reputations unimpaired by false and defamatory attacks." Privileges that restrict recovery for defamation reflect the competing "paramount public interest [in] permitting persons to speak or write freely without being restrained by the possibility of a defamation action." They are "designed to protect speech in those narrowly defined instances in which the public interest in unrestrained communication outweighs the right of redress."
>
> [Citations omitted.]

In its thorough discussion, the Court recognized the general rule, which we discussed previously, that "to republish a defamatory statement, the reporter or newspaper must verify that a statement was spoken,

and also that the substance of the statement is true," but also recognized that the fair report privilege "is an exception to the general rule that imposes liability for republication of a defamatory statement." Ibid. (citing Swede v. Passaic Daily News, 30 N.J. 320, 332-33 (1959)).

The Court further recognized that the purpose of the fair report privilege was "to assure that people who report on official releases about public concerns will not be held responsible for the contents of the reports," id. at 607 (quoting Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1085 (3d Cir. 1988)), and, as a result, explained that the privilege had application "to reports of defamatory statements made in judicial and other official proceedings," because

> [p]rotection for such republication furthers the public interest "that information be made available as to what takes place in certain kinds of judicial, legislative, and other public proceedings." Prosser and Keeton on Torts § 115 (5th ed. 1984). The underlying rationale is that "any member of the public, if he were present, might see and hear for himself [statements made at a public proceeding], so that the reporter is merely a substitute for the public eye." Ibid. In [Rogers v. Courier Post Co., 2 N.J. 393,

> 402 (1949)], we defined the fair-report privilege as follows: "[a] full, fair and accurate report of a judicial proceeding is qualifiedly privileged, although the report contains matters that would otherwise be defamatory and actionable, and no action will lie therefor except on proof of malice in making it."
>
> [Costello, supra, 136 N.J. at 607.]

Having stated its purpose and the competing interests that it reflects, the Costello Court explained what must be shown for the fair report privilege to apply in a given case. First, a court must ascertain, through application of an objective test, whether the report is "a full, fair and accurate account of the official proceeding." Ibid. (citing Bock v. Plainfield Courier-News, 45 N.J. Super. 302 (App. Div. 1957)); see also Sedore v. Recorder Publ'g Co., 315 N.J. Super. 137, 152 (App. Div. 1998). In this regard, the Court relied upon and quoted from Restatement, supra, § 611 comment f, declaring that the report of public proceedings should not convey an erroneous impression to those who read or hear it; that "[i]t is not necessary that [the account] be exact in every immaterial detail"; but that "[i]t is enough that it conveys to the persons who read it a substantially correct account of the [contents of the official document]." Costello, supra, 136 N.J. at 607.

In addition, the Costello Court held that the report must not only meet this test of accuracy but that it "must also be fair," id. at 608, explaining:

> A report that is accurate may not be edited and deleted in a way that renders its contents misleading. Fairness requires that although the report need not be exhaustive, "it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it." Although a reporter is allowed to make factual errors and omissions, the fair-report privilege will not protect a story if the errors and omissions mislead readers.
>
> [Ibid. (quoting Restatement, supra, § 611 comment f).]

In applying these principles, the Costello Court concluded that an article was inaccurate because it used the present tense in its headline and opening paragraph to suggest that legal action was pending when, in fact, no complaint had been filed. 136 N.J. at 608-09. And, in Schiavone, the court held that a report accurately indicated that plaintiff's name had been mentioned in a confidential FBI memo in connection with the disappearance of Jimmy Hoffa,

but failed to mention that the report expressly stated that the reference to plaintiff did not suggest any criminality or organized crime associations; the court concluded that this omission presented "a clear example of an unfair report that does not deserve the qualified privilege to reproduce a libel." 847 F.2d at 1088.

(2)

Salzano alleges defendants' report about the bankruptcy complaint was not accurate or fair because defendants erroneously stated that the trustee alleged Salzano stole funds from NorVergence, whereas, in Salzano's interpretation, the trustee had only alleged that Salzano was the recipient of NorVergence funds that had been fraudulently diverted. Defendants respond that "reasonable persons of ordinary intelligence," Romaine, supra, at 109 N.J. at 290, would understand there is little distinction between the two assertions, and, regardless, the trustee had actually alleged that Salzano had misappropriated NorVergence funds.

We must initially recognize that defendants' arguments are asserted in support of an order that dismissed the complaint for failure to state a claim upon which relief may be granted, and the test for determining the adequacy of a pleading is whether a cause of action is suggested by the facts. Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988). In applying this test, the reviewing court must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Printing Mart-Morristown v. Sharp Electronics Corp.,

116 N.J. 739, 746 (1989) (quoting Di Cristofaro v. Laurel Grove Mem. Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). This approach requires that we determine whether there is an arguable basis for Salzano's contention that the article expresses or implies more reprehensible conduct than alleged in the bankruptcy complaint.

There is no doubt that the article's headline and opening paragraph assert that Salzano "stole" NorVergence funds. To obtain a more precise understanding of the bankruptcy complaint -- namely, that assets of NorVergence were fraudulently diverted to Salzano -- the reader must consider the additional information conveyed later in the articles. Although the articles' opening salvo that Salzano stole funds is not perfectly accurate -- the trustee never used the word "stole" -- the question we must decide is whether the sting of the article conveys essentially the same sting as the bankruptcy complaint. Lawrence, supra, 89 N.J. at 460. We conclude that it does.

The "sting" is derived not only from the particular words alleged to be defamatory, but also from a reasonable understanding of those words, read in conjunction with the article's headline, Molin v. The Trentonian, 297 N.J. Super. 153, 158 (App. Div.), certif. denied, 152 N.J. 190 (1997), cert. denied, 525 U.S. 904, 119 S. Ct. 239, 142 L. Ed. 2d 196 (1998), and with appreciation for its entire context, Romaine, supra, 109 N.J. at 288. Here, the essence of the judicial proceeding reported upon is that the trustee sought civil remedies against Salzano as a result of what the trustee claims to be his fraudulent receipt of NorVergence assets. In that regard, the bankruptcy complaint alleged that Salzano had "unlawfully diverted, converted and misappropriated"

NorVergence's funds "for his own personal benefit." Although a finer point can be put on these allegations in consideration of the theories for recovery asserted by the trustee, the words utilized by defendants to recount what the trustee had alleged carry the same essential sting. That is, there is no material difference in this setting between an allegation that a person stole funds or that a person received stolen funds, but -- because the trustee also asserted that Salzano had "unlawfully diverted, converted and misappropriated" NorVergence's funds -- the sting of the article's claim that Salzano "stole" funds is indistinguishable from the actual content of the bankruptcy complaint.

As a result, even though the standard of review requires liberality in the interpretation of the complaint, Printing Mart-Morristown, supra, 116 N.J. at 746, we cannot adopt Salzano's assertion that defendants' claim that the trustee alleged Salzano had "stolen" the debtor's funds has a greater sting than the trustee's actual allegations. Accordingly, if we were to apply the fair report privilege, we would conclude that defendants' articles provided a fair and accurate description of the trustee's allegations.

(3)

Even though defendants fairly and accurately reported the content of the bankruptcy complaint, we conclude that defendants are not entitled to assert the privilege in this instance.

The Court in Costello determined that the fair report privilege does not apply to "[t]he publication . . . of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken . . . ." 136 N.J. at 611 (quoting

Restatement, supra, § 611 comment e). The Court held that "[t]o rule otherwise would promote the filing of lawsuits that would be promptly discontinued once the goal of public defamation or even extortion were achieved." Id. at 612. See also Restatement, supra, § 611 comment e (observing that "[a]n important reason for this position has been to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its content and then dropping the action"); Prosser, supra, § 115 at 837 (observing that "it is the prevailing view, with some few courts to the contrary, that a pleading or a deposition filed in a case but not yet acted upon may not be reported under the claim of privilege"). As succinctly observed by Justice Holmes, this exception to the privilege is based upon "the plain distinction between what takes place in open court, and that which is done out of court by one party alone." Cowley v. Pulsifer, 137 Mass. 392, 395 (1884). The fair report privilege applies only to the former instance, not the latter. The bankruptcy complaint was the initial pleading in the trustee's claim against Salzano and, thus, constituted an act of "one party alone."

Defendants, however, would have us adopt a more nuanced approach to the initial pleading exception to the fair report privilege. They assert that this particular exception should not apply when the initial pleading is filed "by government officials, such as a U.S. Trustee, County Prosecutor, U.S. Attorney, or police." Although defendants do not explain why they believe such a distinction should be drawn, we assume they are suggesting that government officials are not likely to engage in the type of misconduct asserted as a basis for the initial pleading exception.

In support of this theory, defendants have cited only to cases from other jurisdictions that are immediately distinguishable because these other jurisdictions do not even recognize the initial pleading exception to the fair report privilege. See Kamler v. Chicago Am. Publ'g Co., 225 N.E.2d 434, 437 (Ill. App. 1967); First Lehigh Bank v. Cowen, 700 A.2d 498, 502 (Pa. Super. 1997); Mark v. King Broad. Co., 618 P.2d 512, 518 (Wash. App.), aff'd, 635 P.2d 1081, 1089 (Wash. 1981), cert. denied, 457 U.S. 1124, 102 S. Ct. 2942, 73 L. Ed. 2d 1339 (1982). We would add that the initial pleading exception to the fair report privilege has also been rejected in New York. Campbell v. N.Y. Evening Post, 157 N.E. 153, 155-56 (N.Y. 1927) (finding its continued application to be "indefensible"). Defendants, however, have not referred us to a single decision in which a court -- in a jurisdiction that recognizes the initial pleading exception -- insisted that it apply only to private litigants and not governmental litigants. Considering that in Costello our Supreme Court adopted the initial pleading exception without hinting at the possibility of the approach urged by defendants, we decline to adopt a nuanced limitation upon that exception. Although we would prefer to think otherwise, we are not so naïve as to believe there are not unscrupulous persons in government who might exceed or abuse their authority by engaging in the type of tactic that justified adoption of the initial pleading exception. We need look no further than the abuses of the McCarthy era for justification of our rejection of defendants' novel argument.

Moreover, even if we were to adopt defendants' theory, we would note that they have not shown that the circumstances here would permit its application.

Although defendants argue that the bankruptcy complaint lodged against Salzano was filed by the United States Trustee,[3] the pleading itself suggests otherwise. The complaint was filed by the law firm of Porzio, Bromberg & Newman, which is identified in the pleading as special litigation counsel for Charles M. Forman, who is identified in the complaint as "the duly appointed and acting Chapter 7 Trustee of the bankruptcy estate of NorVergence, Inc." Another paragraph of the complaint belies the claim that Forman was actually the United States Trustee by alleging that "[o]n July 14, 2004, the Office of the United States Trustee appointed Charles M. Forman to serve as the Trustee for the Debtor's Chapter 7 Estate." In short, taken at face value, the complaint was not filed by the United States Trustee; it was filed by a law firm retained by another lawyer who was appointed by the United States Trustee to serve as the trustee for the debtor's estate. As a result, although we are not inclined to adopt a limitation on the initial pleading exception to the fair report privilege, even if we did we would not apply it in these circumstances.

To summarize, because the trustee's complaint was filed in the bankruptcy court the day prior to the first of these articles, and was not subject to any sort

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[3]Defendants' references throughout their submissions in this court to Charles M. Forman as "U.S. Trustee" are not supported by the record. Although this is a fact that we assume is easily demonstrable following remand, our holding suggests that this fact might no longer have relevance.

of judicial review by the time the articles were published, we must conclude that the fair report privilege does not apply and defendants were not relieved of liability for republishing the alleged defamatory statements contained within the bankruptcy complaint on that basis.

C

Defendants lastly argue that Salzano is a public figure or a private figure involved in a matter of public concern, that the actual malice standard applies to their articles, and that the complaint lacks a sufficient allegation that defendants knew the statement was false or defendants recklessly disregarded its falsity. Assuming, as we must at this stage, that the statements that Salzano stole money are false and defamatory, a critical question in this suit is whether Salzano is a private figure, who can prevail by showing negligence, or a public figure or limited purpose public figure, who can prevail only upon demonstrating actual malice. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 351, 94 S. Ct. 2997, 3012-13, 41 L. Ed. 2d 789, 812 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706 (1964); Costello, supra, 136 N.J. at 612. Whether Salzano is a public figure, or whether his relation to the subject matter of the publication requires application of the actual malice standard, are matters of law for the court's determination. Costello, supra, 136 N.J. at 612; Lawrence, supra, 89 N.J. at 462.

Because our courts have applied the actual malice standard where the topic of the report is one of public concern, Dairy Stores, Inc. v. Sentinel Publ'g Co., 104 N.J. 125, 143-44 (1986), or where the report

relates to a private person involved in a regulated industry and whose involvement one would "reasonably expect implicates a legitimate public interest with an attendant risk of publicity," Sisler v. Gannett, 104 N.J. 256, 279 (1986), determining whether the actual malice standard should be applied in a given situation can often prove troublesome. See Gertz, supra, 418 U.S. at 346, 94 S. Ct. at 3010, 41 L. Ed. 2d at 809 (recognizing the "difficulty of . . . decid[ing] on an ad hoc basis which publications address issues of 'general or public interest'"); Dairy Stores, Inc., supra, 104 N.J. at 144 (recognizing that "not everything that is newsworthy is a matter of legitimate public concern, and that sorting such matters from those of a more private nature may be difficult"). Here, it cannot be legitimately argued that Salzano was a public figure at the time of publication; he clearly was not. But there is also little doubt that Salzano's father, who was the chief managing officer of NorVergence, is a public figure because NorVergence was involved in a highly-regulated industry and the claims regarding its eventual decline into bankruptcy made its business affairs a matter of public interest and concern. As a result, it is fair to conclude that the statements in question were made of a private person who, by fact of the suit brought against him by the trustee, had become enmeshed in a matter of public concern. This is sufficient to bind Salzano to the actual malice standard.

In this regard we chiefly rely on the Court's decision in Sisler, which bears similarities. There, plaintiff Sisler was a retired bank president. The Courier-News reported that Sisler had received an under-collateralized loan from his former bank in order to finance his horse farm, and that federal and

state authorities were investigating this "questionable" loan, suggesting Sisler improperly benefited from insider dealing. 104 N.J. at 259-60. The article, in fact, was inaccurate. Id. at 260.

The Court held that Sisler, as a former bank official, was neither a public official nor a public figure. Id. at 269-70. He was, however, held to the actual malice standard. The Court explained that "the propriety of substantial loans issued by an area bank to its former-president and founder is a topic of legitimate public interest," and that "[t]he press thus has an important function not only in reporting government activity respecting banking but also in informing the public about bank conduct." Id. at 268-69. For the same reason, we hold that although Salzano is a private figure, whether he unlawfully received NorVergence funds is a matter of legitimate public interest. The articles indicate that "NorVergence's abrupt bankruptcy in July 2004, threw 1,300 people out of work and left thousands of small-business customers without phone and Internet service"; that "a federal court entered a $181.7 million default judgment against NorVergence in a case brought by the Federal Trade Commission"; and that NorVergence "owes $550 million." These circumstances have not been disputed. In light of the general public concern about NorVergence, and its activities, a claim brought by its bankruptcy trustee to recover nearly $500,000 of NorVergence funds allegedly diverted to Salzano is also a matter of public concern. That the claimed recipient of those allegedly diverted funds was a private figure does not trump

the public concern regarding the ongoing saga of NorVergence.[4]

Concluding that the actual malice standard applies in this case, however, does not end the matter. We must also consider whether Salzano's complaint sufficiently pled facts that would, if proven, support a finding that defendants acted with actual malice. Here, it is true that Salzano's complaint only alleges actual malice in a general, conclusory way. We do not view this, however, as immediately fatal. Now that we have resolved the legal question concerning the appropriate level of fault, it is appropriate to provide the pro se plaintiff with the opportunity to file an amended complaint before ultimately determining whether this defamation suit may be further maintained. See Printing Mart-Morristown, supra, 116 N.J. at 772.

We lastly observe with regard to any future application to dismiss that the judge should be mindful that evidence of actual malice, which may often require examination of the defendant's state of mind, is not always available to a plaintiff. Accordingly, upon the filing of an amended complaint and the anticipated renewal of a motion for dismissal or a motion for summary judgment, not only should the judge consider whether the pleading sufficiently

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[4]The conducting of businesses that do not meet the public concern standard have been recognized in Senna v. Florimont, __ N.J. __ (2008) and Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392 (1995), cert. denied, 516 U.S. 1066, 116 S. Ct. 752, 133 L. Ed. 2d 700 (1996).

alleges actual malice and the assertion of all relevant details that Salzano may have access to in that regard, but also the fact that information regarding defendants' state of mind is not always accessible to a defamation plaintiff absent discovery. See Standridge v. Ramey, 323 N.J. Super. 538, 547 (App. Div. 1999); see also Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9, 99 S. Ct. 2675, 2680 n.9, 61 L. Ed. 2d 411, 422 n.9 (1979) (recognizing that "proof of 'actual malice' calls a defendant's state of mind into question . . ., and does not readily lend itself to summary disposition"); Costello, supra, 136 N.J. at 615 (observing that "[b]ecause the issue of a defendant's state of mind 'does not readily lend itself to summary disposition,' courts are wary of disposing of cases involving actual malice through summary judgment").

III

Our discussion to this point has focused on the allegedly defamatory statements that Salzano "stole money" from NorVergence. Not to be overlooked is the fact that Salzano has also claimed the articles defamed him by asserting that he and his father "started a Kenilworth business last year called Charity Snack, which also went belly-up." Because that statement is not contained within the bankruptcy complaint, the fair report privilege has no application to this particular aspect of Salzano's suit.

We can find no analysis in or between the few short lines of the judge's oral decision regarding this aspect of the complaint. Ordinarily, we would not necessarily consider the point, leaving it to the trial court's consideration following our remand, but we are satisfied there is an arguably defamatory meaning in

the statement regarding the Kenilworth business to preclude its dismissal at the pleading stage.

In considering the sufficiency of this claim, we are required to apply the well-established standard for determining whether defamation allegations state a claim upon which relief may be granted. That is, if a statement is susceptible only to a non-defamatory meaning, the claim must be dismissed, Decker v. Princeton Packet, 116 N.J. 418, 424 (1989), but if the statement is "capable of more than one meaning, one of which is defamatory and another not, the question of whether its content is defamatory must be resolved by the fact finder," Russo v. Nagel, 358 N.J. Super. 254, 263 (App. Div. 2003) (citing Romaine, supra, 109 N.J. at 290-91). The present record suggests that a defamatory meaning may be attributed to defendants' reference to the Kenilworth business in at least two ways.

First, the statement may be construed as suggesting that Salzano is a poor or incompetent businessman. A false assertion that a person is incompetent with regard to a chosen trade or profession is actionable without proof of damage. Biondi v. Nassimos, 300 N.J. Super. 148, 154 (App. Div. 1997); Reilly v. Curtiss, 83 N.J.L. 77, 78 (Sup. Ct. 1912); see also Prosser, supra, § 112 at 790-91; Restatement, supra, § 573. Here, the record reveals far too little information for a determination of whether the statement is false. Moreover, the record does not indicate whether the statement asserts that Salzano is incompetent at his particular calling because his chosen trade or profession is not revealed by the complaint. Considering that Salzano's assertion in this regard is at least colorable, the judge mistakenly dismissed this aspect of the complaint.

Second, the context in which this statement is found must also be considered. After asserting that Salzano had stolen funds from NorVergence, defendants then stated that Salzano was a participant in a business with his father, "the mastermind" of the NorVergence debacle, that "also" failed. It is arguable that, in this way, defendants attempted to impart a more sinister gloss on the failure of the Kenilworth business by linking it with Salzano's alleged dishonest conduct with regard to NorVergence. In other words, the statement regarding the Kenilworth business, in light of its context, could be interpreted by "reasonable persons of ordinary intelligence," Romaine, supra, at 109 N.J. at 290, as suggesting that the Kenilworth business "also" failed because of Salzano's alleged dishonest conduct regarding NorVergence.

We lastly observe that because the matter has not been the subject of discussion in the trial court, it is not presently appropriate to ascertain whether the actual malice standard should apply to this aspect of the claim. Although we have held that Salzano is a private figure involved in a matter of public concern regarding the NorVergence situation, it does not necessarily follow that he is similarly cloaked with regard to the Kenilworth business. We deem it appropriate to leave the issue for further examination and consideration in the trial court, where this issue may be more fully developed.

IV

For these reasons, we reverse the order of dismissal. We remand for the trial court's entry of an order providing Salzano with the opportunity to file

an amended complaint within a brief and reasonable period of time.

Because we recognize that the summary judgment procedure is "an important tool for disposing of non-meritorious libel lawsuits," Costello, supra, 136 N.J. at 605; see also Standridge, supra, 323 N.J. Super. at 547-49, our reversal of the order of dismissal should not be deemed to foreclose the filing of dispositive motions following Salzano's filing of the anticipated amended complaint or, if necessary, the further development of those issues we have not resolved.

Reversed and remanded. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
ESSEX COUNTY
DOCKET NO. ESX-L-1429-07

THOMAS JOHN SALZANO,	)	Transcript
	)	of
Plaintiff	)	Motion
	)	to Dismiss
	)	
vs.	)	
	)	
NORTH JERSEY MEDIA GROUP, INC. D/B/A THE RECORD, ET AL.	)	
	)	
Defendants.	)	

Place: Historic Courthouse
470 Dr. M.L.K. Jr., Blvd.
Newark, New Jersey

Date: July 27, 2007

Before:
THE HONORABLE HECTOR E. DESOTO, J.S.C.

APPEARANCES:
THOMAS JOHN SALZANO, Plaintiff Pro Se

BRUCE ROSEN, ESQ. (McCusker, Anselmi, Rosen & Carvelli) Attorney for Defendants

Transcriber, Karen Cohen
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Pompton Plains, New Jersey 07444

Sound Recorded
Recording Operator, F.M. Darby

THE COURT: The next matter is Salzano versus North Jersey Media Group, docket L-1429-07. All right, let me get appearances please.

MR. SALZANO: Good morning, Your Honor. Thomas John Salzano, pro se plaintiff.

MR. ROSEN: Bruce Rosen; McCusker, Anselmi, Rosen and Carvelli in Chatham for the defendants.

THE COURT: All right. This is a motion by defendants-- I'm trying to remember offhand, is it all defendants or is there- -

MR. ROSEN: All defendants, Judge.

THE COURT: All? Okay.

MR. ROSEN: Except for one that we don't represent.

THE COURT: Right, that's what I thought. I thought there was one other defendant - -

MR. ROSEN: That was the - -

THE COURT: - - not involved. Okay.

MR. ROSEN: - - that was the - - Frank Orrechio (phonetic). I don't believe he was served.

THE COURT: All right. This is defendants' motion to dismiss. All right, Mr. Rosen - - you may be seated counsel. Mr. Rosen, I'll hear you.

MR. ROSEN: Thank you, Judge. This is sort of an omnibus. This motion for dismissal. It's - - and I know this is a subject matter that the Court probably doesn't hear very often, which involves libel and associated torts. And I'd like to just sort of go over what we're asking for very quickly and then go into some salient points as we've certainly briefed this matter.

This case involves - -

THE COURT: The gravamen of it is a - - articles reported in - -

MR. ROSEN: The Bergen Record.

THE COURT: - - the Bergen Record with regard to some ch – charges and or other court proceedings in I believe it was bankruptcy court or - -

MR. ROSEN: That's correct, Judge.

THE COURT: Okay.

MR. ROSEN: The U.S. Trustee, who is essentially the civil prosecutor for the government, who assigns out to - - hires counsel, made an allegation in court, which

was filed in Federal Court, against the plaintiff and essentially said, and the copy is attached to the complaint, that the plaintiff misappropriated, fraudulently transferred, converted upwards of fi- - almost $500,000 worth of - - of dollars that were taken from Norvergence. Norvergence was a telecom company in Newark. It went out of business, I think it was an involuntary bankruptcy, and 1,300 people lost their jobs.

The Record covered this for many, many months, covered the layoffs, covered the first filing of the bankruptcy, covered the Federal Trade Commission bringing charges against Norvergence and I believe its officers, and at this point, in - - two years later, an allegation was made by the trustee against Mr. Salzano, the plaintiff. And what the allegation essentially said is that all this money was being siphoned off from the bankrupt entity to Mr. Salzano, paid for his house and paid for almost $300,000 in credit cards.

Whether it was justified or whether it wasn't justified isn't the issue. A public - - sort of civil prosecutor for the government made an allegation in open court. It goes back to the founding fathers as to this is what newspapers do, this is what the media does, you report what happened. So I don't know that plaintiff really disagrees with that except that he feels aggrieved at the way it was reported because of the word - - the description of the charges, which were stole - - the word stole, stealing.

We went over for the Court the - - the process by which the Court must analyze these. In libel cases the Judge acts as a gatekeeper. The Judge makes the initial determination as to whether the complaint of materials are defamatory. W - - first they must be

false and they must - - they must negatively affect the reputation of the person in the community. It's our claim that - - our assertion that it's not false. That we gave you dictionary definitions of what stole and stealing are. Those dictionary definitions are a reasonable reflective - - what a reas - - a person of reasonable intelligence would take from the article. The - -

THE COURT: Well, what was the exact statement? It wasn't - - I wasn't real clear - - you know, the context of that statement be - - in reviewing this.

MR. ROSEN: Well, the headline reads, Man Accused of Stealing 500,000 for High Living. The article says that the son of the mastermind behind Norvergence, a bankrupt Newark communications firm, allegedly stole close to 500,000 from the company, using the money to pay for drinks, trips to area clubs and for a five bedroom Glen - -

THE COURT: All right, I - - I got it. That's what I wanted to know. Because other than the headline I hadn't gotten the gist of what the actual contents of the article were regarding that.

MR. ROSEN: But by the time you've reached the bottom of the first paragraph you know that these papers were filed in U.S. Bankruptcy Court in Newark. Having read, I'm sure, Judge, you know, thousands of articles involving crimes, there's no mention of an arrest, there's no mention of an ar - - of the possible penalties, there's no mention of an arraignment, there's no mention of a guilty plea,

there's no mention of anything except what would happen in bankruptcy court.

These allegations were made and involved fraudulent transfer, mis - - conversion, all sorts of allegations, under the bankruptcy code and under the common law, that say that this stuff does not - - this money did not belong to Mr. Salzano, it belonged to Norvergence, and Mr. Salzano took it. That's what the allegations are. That's what the dictionary says is stealing. Taking something without authorization. It doesn't say taking something without authorization and - - with criminal penalties. It's not like the word theft. This is simply the word stealing. And stealing has a specific meaning. If a newspaper reporter went to the dictionary, what word should I use, and the dictionary said taking without authorization, that's exactly what happened in this case.

Now, this doesn't feel good to - - to Mr. Salzano, but that's not the standard in the law. The standard in the law is what a person of reasonable intelligence would understand this to mean. And even if for one specific moment they saw stealing and the said, oh my god, the case law is very, very clear that you can't just take the headline, you can't just take the first line, you can't take the first paragraph. You must take the entire publication together, on its face, and say, after reading the entire thing, can someone come away with this and believe that these are criminal charges? And the answer is no. There's no - - any one that reads thought this article can't come away from this. There's no mention of criminal charges anywhere in this article. There's no mention of an arrest. There's - - and this - - there's no mention of penalties, there's no mention of a U.S. attorney who would have brought this - - this allegation. It simply says it was

filed in bankruptcy court. It says that this was a bankrupt estate and the money was transferred illegally. That's what the allegation is. It is an allegation. There's no doubt that it's an allegation.

But what would happen to the press if they must make - - there's no - - I'm sorry. There's no case or – or law that says the press must report word for word what it says in the - -in any filing. In fact there's cases, I believe that we pointed out which said you have some leeway to make a description. What we did was provide a layman or actually a dictionary definition of what happened here. What the allegation was. I'm not even saying what happened because Mr. Salzano might tell you that it didn't happen that way and he might be correct. I don't know. But what I do know is that these allegations, and it's undisputed these allegations were filed, they were filed publicly and - - and the dictionary definition of what was reported, combined with the information that was reported, was completely true. So that, at the outset, there's no falsity. If there can't - - if there's no falsity, there can't be libel.

So even if you got past that and you - - you - - you went and you s - - and Your Honor said there was falsity, the next level of analysis is to - -is to look at whether it has a negative impact on his reputation in the community. Well that must be sorted out with the other allegations and what it said because it did say that he was the recipient of a fraudulently transferred funds. And the Judge has to weigh whether - - taken at its context, this is defamatory, even if it's not false - - even if it is false.

So that's the first level analysis. And this is something that the Court must do because we need - - you're the gatekeeper, Judge. You decide at the

outset whether this moves forward. It's unlike any other tort in that sense where the Court makes certain determination as to whether the matter can go forward. And there's actually terrific reason for that because in case after case the Courts of this state and other states - -

THE COURT: Let me ask a question, going beyond that. I take it it's your position that the heightened standard of malice applies in this case because it's a regulated industry?

MR. ROSEN: Because it's a regulated industry, because there is consumer fraud and - - and fraud involved. I think Turf Lawnmower goes - -

THE COURT: Okay.

MR. ROSEN: - - directly to - - to that.

THE COURT: All right. All right, let me hear from the defendant - - from plaintiff, I'm sorry.

MR. SALZANO: Good morning, Your Honor. I ba - - I completely disagree on all of the points brought up in the motion to dismiss.

THE COURT: If you didn't we wouldn't be here.

MR. SALZANO: First of all, the complaint was an eight page complaint. I was one adversary proceeding of over 300 filed in the Court. The complaint did not accuse me of stealing anything. The complaint accused me of a fraudulent transfers and such but it's clear in the law that the- - that - - that it has to be

material, what they report, and saying that I stole $500,000 connotes criminality - -

THE COURT: You don't consider a fraudulent transfer a theft?

MR. SALZANO: No - - but trans - - transfer - -

THE COURT: I think - - I think that the criminal law would not support that position.

MR. SALZANO: But what I'm - - my entire argument is that it was in - -it was an inaccurate reading of what the complaint said. And there's plenty of case law that I cited that shows that it has to be a material - - that the can report on immaterial or omissions of what the - -

THE COURT: How - - well how is it inaccurate if in fact - -

MR. SALZANO: I didn't - -

THE COURT: - - they're equating this stealing for the fraud - - the alleged fraudulent transfer? And quite - - and apparently even - - I forgot if it was in the headline or the article but it clearly says alleged stolen funds. I mean, the - - they're not saying that they were in fact stolen, they're merely reporting that there's an allegation of that.

MR. SALZANO: But there's - - there's quite significant case law that shows that when someone has done - - is alleged to have done something different and they report on something that's

completely not what the complaint said, that they have to abide by what the complaint says. Now the defendant - - the defendants had this complaint in their possession, as is noted in their - - in the article, saying that I was not there for comment and the trustee was not there for comment. They had the actual complaint and nowhere in the complaint, and I have confirmed this with the counsel for the trustee, there's no - - there's no allegation of stealing. And stealing automatically implies criminality and - -

THE COURT: And, again, you don't find - - you don't th - -believe that a fraudulent transfer - - listen to those words, fraudulent transfer, is a theft?

MR. SALZANO: No, I don't, because not in the context of bank - - bankruptcy law which - -which I am still in court with. And I would like to just make it known on the record that the American Express allegations were voluntarily dismissed by the trustee because they weren't - - it wasn't my card and I - - and the money that was used for the purchase of my family home, in which my mother and sisters reside, was familial support from my father. It was declared income of my father. I proved this with - - with - -to the trustee on the tax returns, that he filed the tax, that it was gifted to me. But even - - even notwithstanding that, the fact of the matter is, there's - - there's - - there's case law in Lawrence versus Bauer Publishing, statement that the plaintiff might be charged with criminal conduct defamatory as a matter of law, you know, truth is - - and in Schiavone Construction Corp., black letter law is clear, truth is no defense where the plaintiff is found to have engaged in some other substantially different kind of

misconduct even though it is equally or more reprehensible. In the Evening - - in the Hill versus The Evening News the Appellate Division found that the term convicted killer, when used in conjunction - - conjunction with reference to a manslaughter charge reasonable could connote criminal culpability and that these statements convey the impression that Hill - - that that plaintiff had killed the person and was convicted of charges greater than aggravated assault. They- - they labeled me as stealing money. I am not in criminal court for this. This is in bankruptcy context. And the - -

THE COURT: No, okay, let's - - let's stop there. That's your position. That's not a reasonable interpretation of that headline or article, period. It's not. That's not what is says. It's not what it says on plain meaning to me. And I don't believe that it would - - that it's what any reasonable person would find to be its plain meaning.

MR. SALZANO: It said according to the complaint filed by the trustee. That's not what the complaint said. The trustee didn't accuse me of - -

THE COURT: Let's go beyond that. Where is your proof of actual malice?

MR. SALZANO: My proof of malice is the fact that they knew or sh - - they did know what the complaint stated because they obtained a copy of the complaint and published, you know, misplaced quotes from the complaint before - - before I was even served it and that shows that they h - - they knew what the

complaint said yet they - - they fabricated the allegation of stealing.

THE COURT: All right. I've heard enough. Look, I'm going to grant the motion as - - with regard to the named defendants in the motion for several reasons. One is I do not feel that the defendant - - that the plaintiff's position with regard to the statements is a reasonable interpretation of that and that, in any case, the - - this matter is subject to the heightened standard of malice and that there is in fact no reasonable showing of any malice. I can understand why plaintiff is upset with regard to the reporting as not being totally, 100 percent accurate. But that's not the standard that we apply. And based on the arguments presented I find that this matter - - that the complaint does fail to state a cause of action in defamation with regard to these particular defendants. And I so rule. You can just wait for a copy of the order.

MR. ROSEN: Thank you, Judge.

CERTIFICATION

I, Karen Cohen, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on July 27, 2007 on tape number 1 from 0480 to 1445, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

/s/
KAREN L. COHEN, AOC# 371
G&L TRANSCRIPTION OF NJ Date: 8/6/07

SUPREME COURT OF NEW JERSEY
M – 1382 September Term 2009
063529

THOMAS JOHN SALZANO,

PLAINTIFF-MOVANT,

V.

ORDER

NORTH JERSEY MEDIA GROUP, INC.,
D/B/A THE RECORD, ET AL.,

DEFENDANTS.

FILED
JUL 19 2010

/s/
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration of the opinion in A -78-08 is denied.

WITNESS, the Honorable Virginia A. Long, Presiding Justice, at Trenton, this 15th day of July, 2010.

The foregoing is a true copy
of the original on file in my office.
/s/
CLERK OF THE SUPREME COURT
OF NEW JERSEY

/s/
CLERK OF THE SUPREME COURT

A-006715-06

CONSTITUTIONAL AND STATUTORY PROVISION(S) INVOLVED

(cont. from page 2 petition for certiorari)

The Restatement (Second) of Torts §611, (1977) states:

Report of Official Proceeding or Public Meeting

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported. The privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false.

Comment a at 297 to the Restatement (Second) of Torts §611, (1977) states:

The privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false.

Comment b at 298 to the Restatement (Second) of Torts §611, (1977) states:

The privilege stated in this Section permits a person to publish a report of an official action or proceeding * * * even though the report contains what he knows to be a false and defamatory statement. The constitutional requirement of fault is met in this situation by a showing of fault in failing to do what is reasonably necessary to insure that the report is accurate and complete or a fair abridgement.

Comment e to the Restatement (Second) of Torts §611, (1977) states:

[t]he publication ... of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the rule stated in this Section. An important reason for this position has been to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its content and then dropping the action.

Title 11 U.S.C. Section § 544 states:

Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable

law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.
(b)
(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502 (e) of this title.
(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548 (d)(3)) that is not covered under section 548 (a)(1)(B), by reason of section 548 (a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case

Title 11 U.S.C. Section §548 states:
Fraudulent transfers and obligations
(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of filing of the petition, if the debtor voluntarily or involuntarily —
(1) made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity to which the debtor was or became on or before the date that such transfer was made or such obligation was incurred, indebted; or
(2) (A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B) (i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

Title 11 U.S.C. Section § 550 states:
Liability of transferee of avoided transfer
(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553 (b), or 724 (a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
(2) any immediate or mediate transferee of such initial transferee.
(b) The trustee may not recover under section (a)(2) of this section from—
(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or
(2) any immediate or mediate good faith transferee of such transferee.

Supreme Court, U.S.
FILED
DEC 2 8 2010
OFFICE OF THE CLERK

No. 10-616

IN THE

Supreme Court of the United States

THOMAS JOHN SALZANO,

Petitioner,

v.

NORTH JERSEY MEDIA GROUP, INC.,
dba THE RECORD, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Petitioner presented compelling reasons to grant the Petition, where the Petition does not implicate an important federal question that has not been settled by this Court and where the Petition is interlocutory?

II. Whether the Petitioner presented compelling reasons to grant the Petition, where the holdings of the Supreme Court of New Jersey are based on state common law and do not conflict with a decision of this Court or a Court of Appeals?

III. Whether the Petitioner presented compelling reasons to grant the Petition, where Petitioner is asking this Court to review the factual and legal determinations of the Supreme Court of New Jersey, where that Court ruled that (1) the State common law fair report privilege applies as a conditional privilege only until a court determines that the report was fair, accurate and complete, when the privilege then becomes absolute; (2) the initial pleadings exception for the fair report privilege contained in the Restatement (Second) of Torts § 611 (e) would thwart the public policy underpinning of the fair report privilege, the free flow of information based upon state defamation law; and, (3) allegations against Petitioner contained in a Complaint filed on behalf of the U.S. Trustee in Bankruptcy Court "fitted comfortably within the definition" of the word "steal," which was used in a news report to describe the contents of that Complaint.

CORPORATE DISCLOSURE

Respondent North Jersey Media Group Inc. d/b/a *The Record* and northjersey.com is a wholly-owned subsidiary of Macromedia Incorporated, a privately held company, and there is no publicly held company that owns 10% or more of its stock.

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INTRODUCTION

Pro se Petitioner has presented no "compelling reasons" for granting of his Petition for a Writ of *Certiorari*. In fact, the Petition does not meet **any** of this Court's criteria for grant of the Writ: the Petition does not implicate an important federal question left unsettled by this Court, it does not address a conflict between the Courts of Appeals, and finally, it is interlocutory, coming after resolution of a motion to dismiss the case in the Supreme Court of New Jersey, which remanded the remaining portion of this matter back to the trial court for further proceedings.

This matter involves pure application of state defamation law by a state's highest tribunal in dismissing most of Respondent's claims under the fair report privilege. The Supreme Court of New Jersey made three rulings in this matter. First, it unanimously recognized a national trend among state courts interpreting their common and statutory law by holding that the fair report privilege applies to news reports of initial complaints, even if those initial filings have not been the subject of "judicial action," thus rejecting an exception that is contained in the Restatement (Second) of Torts § 611 (e). Second, the high court, also interpreting New Jersey common law, unanimously adopted the modern view that fair report is a "hybrid" of a "conditional" and "absolute" privilege; that is, a news report is conditionally privileged until a court has ruled that it is full, fair, and accurate, at which time it becomes absolutely privileged and cannot be overcome by a showing of actual malice.

Finally, the New Jersey court split 3-3 on whether the privilege applied to this case; that is, whether the "gist" or "sting" of the news reports at issue was any worse than the serious allegations made against Respondent in the Complaint filed by the U.S. Trustee in the involuntary bankruptcy of NorVergence, a Newark, N.J. telecommunications company controlled by Petitioner's family. However, because the New Jersey intermediate court, the Appellate Division of the Superior Court, had ruled affirmatively that the "gist" or "sting" of the news reports was no worse than the language in the Complaint, that portion of the Appellate Division decision was upheld and most of the claims were dismissed.

There can be no dispute that the fair report privilege is a common law privilege, and not a constitutional defense. As the Supreme Court of New Jersey noted below:

> The fair-report privilege is considered to be "one of the most powerful and frequently invoked common-law defenses." Rodney A. Smolla, LAW OF DEFAMATION § 8.67 (Thomson Reuters/West, 2d ed. 2008) and is widely recognized in judicial decisions and by statute. [n.2] The fair report privilege has been recognized by common law or statute in at least forty seven states and the District of Columbia.

Petitioner's Appendix ("Pet. App.") at 18a (balance of footnote omitted from quotation).

In his argument seeking this Court's review, Petitioner confuses the jurisdictional requirement of a conflict among the Federal Circuits with a conflict among the states (or a conflict among Federal Circuits interpreting state law). While many states have slight variations in their fair report privilege, none of these variations involves a federal question, and a conflict among the states regarding state common law issues is not a compelling reason to accept this Petition. These variations clearly fall within this Court's holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), that States are free to make their own standards regarding libel law so long as they do not impose strict liability.

Equally unavailing is Petitioner's argument confusing the *First Amendment* "conditional privilege" imposed by the actual malice standard, which "immuniz[es] non-malicious misstatements of fact regarding the official conduct of a government officer" as set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (and expanded, by its progeny, to public figures and certain matters of public concern), with the "conditional privilege" of a fair report, whereby in many states actual malice can overcome a fair report. In his bewilderment, Petitioner equates New Jersey's decision to end years of conflicting rulings regarding whether the State's fair report privilege was a conditional privilege, with somehow violating this Court's precedents and undercutting reputational protections for *plaintiffs*, which he purports are provided by the actual malice standard. This position constitutes nothing more than a fundamental misunderstanding of both the actual malice doctrine and common law privileges as they are examined in cases Petitioner cites; it does not

present a valid reason for this Court to grant the Petition.

Finally, Petitioner desperately attempts to conjure a federal question by asking this Court to review the lower court's determination that the Trustee's allegations against Petitioner—of fraudulent transfer, common law conversion, misappropriation and unjust enrichment—carried the same "gist" or "sting" as references in headlines and in the body of the news reports at issue. Because a State court's defamation law analysis touched upon *terms used in bankruptcy law*, however, does not mean that a federal question exists. Further, Petitioner's argument, carried to its logical extension, would require that journalists essentially be lawyers, and would permit the fair report privilege only where journalists specifically and exactly define allegations of bankruptcy fraud according to definitions propounded by a federal court. This onerous and unprecedented burden for the media would eliminate the current standard of "substantial accuracy" in determining whether a report is full, fair and accurate. In any event, examination of this issue involves focusing on interpretation of state common law outside of any federal constitutional framework, a practice in which this Court does not engage.

In sum, Petitioner has failed completely to carry his burden of demonstrating that there are compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

On March 1, 2006, the U.S. Trustee for New Jersey, through counsel, publicly filed a Complaint that Petitioner "unlawfully diverted, converted and misappropriated" approximately $470,000 from NorVergence, a bankrupt Newark, N.J. company controlled by his family, "for his own personal benefit," which included the purchase of a residence and charging personal expenses to a corporate charge card, with no intention of reimbursing NorVergence. Pet. App. at 5a-6a, 76a-77a.

The news reports at issue were published on the business pages of *The Record*, which covers northern New Jersey news, and were reprinted on northjersey.com and in the *Glen Ridge Voice*, each published by Respondent North Jersey Media Group Inc. ("NJMG"). Pet. App. at 6a-9a. The reports followed the U.S. Federal Trade Commission's $181.7 million default judgment against NorVergence and the abrupt involuntary bankruptcy of the company, which coincided with the loss of approximately 1,300 jobs and the dislocation of thousands of small businesses dependent on its telecommunications services. *Id.* at 4a, 8a. Together, all of these events made publication of information involving NorVergence's bankruptcy indisputably a matter of public concern.

Petitioner's Complaint for defamation, invasion of privacy, and infliction of emotional distress alleges that the news reports implied that he was criminally charged with theft; specifically, Petitioner alleges that references in headlines and in the body of these news reports, such

as "Man accused of stealing $500,000 for high living," and "Argyle residence allegedly bought with stolen funds" were defamatory *per se* because use of the words "stealing" and "stolen funds" impute criminal conduct and stray from the narrow legal definitions of "fraudulent transfer." *Id.* at 9a-10a. In fact, the allegations in the news reports were broader than simply "fraudulent transfer," and were clearly attributed to information contained in the Trustee's Complaint, which was filed in the *civil* U.S. Bankruptcy Court, and which allegations accused Petitioner of taking funds with the intent not to repay them. *Id.* at 5a-6a, 76a-77a. Moreover, the news reports carried no mention of an arrest, a criminal charge or potential charge, any potential penalties, or the name of a governmental authority that would bring such a charge, such as the U.S. Attorney's Office.

Among other defenses, Respondents asserted the fair report privilege. Pet. App. at 11a. The trial court summarily dismissed the Complaint, ostensibly as a fair report, ruling that the news reports accurately described the Trustee's Complaint and, thus, there was no falsity and no actionable defamation. *Id.* at 100a. The Appellate Division reversed, ruling that while the news reports were full, fair, and accurate, they were not eligible for fair report protection because they were based on an initial complaint against Petitioner that had not yet been subjected to "judicial action." *Id.* at 78a-81a. The news reports were, therefore, excepted from the fair report privilege pursuant to Restatement (Second) of Torts § 611 (e). Pet. App. at 78a-81a. The appellate panel also ruled that under New Jersey law, the news reports were a matter of public concern requiring Petitioner to prove actual malice. *Id.* at 83a.

Both parties sought review in the Supreme Court of New Jersey, which granted certification. That Court first stayed, then unanimously reversed, the appellate panel's holding that the initial filing exception to fair report exists in New Jersey, instead adopting the modern view that no such exception exists. *Id.* at 13a, 30a-31a. The Court then further clarified years of conflicting decisions regarding whether fair report was a conditional or absolute privilege and unanimously held, in accord with Restatement (Second) of Torts § 611 (a), that the fair report privilege:

> is neither fish nor fowl—that is, it is neither purely absolute nor purely conditional. Rather, it is a hybrid; it is conditional insofar as it cannot attach unless the report is full, fair, and accurate. Once that condition is met, the privilege becomes absolute and cannot be defeated. The publisher's failure to do what is necessary to make the report full, fair, and accurate is the only relevant inquiry.

Pet. App. at 40a-41a. Finally, the Court split 3-3 on whether the "gist" or "sting" of the news reports was any worse than the significant allegations against Respondent contained in the Trustee's Complaint. *Id.* at 33a-35a, 48a. Because of the Court's deadlock on this issue, the Appellate Division's previous ruling that the "gist" or "sting" of the news reports was no worse than the Complaint against Petitioner was upheld. *Id.* at 46a.

Thus, the Supreme Court of New Jersey dismissed all claims regarding news reports of the U.S. Trustee's filing, remanding the one remaining claim—libel and

associated torts related to the news reports' description of Charity Snack, a separate business venture between Petitioner and his father—back to the trial court. *Id.* at 46a. The Supreme Court of New Jersey denied a subsequent motion by Petitioner asking it to reconsider its finding that the news report was protected by the fair report privilege. *Id.* at 102a.

REASONS FOR DENYING THE PETITION

THE PETITION SHOULD BE DENIED BECAUSE THIS COURT LACKS JURISDICTION TO DECIDE THE ISSUES PRESENTED BY PETITIONER SALZANO.

The decisions of the New Jersey courts below do not conflict with a decision of this Court or any Court of Appeals, nor do they implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried his burden of demonstrating any "compelling reason" for his Petition to be granted. *See Sup. Ct. R.* 10.

I. The Instant Matter Does Not Involve a Question of Federal Law.

Petitioner Salzano improperly cites 28 *U.S.C.* § 1254 ("Courts of appeals; certiorari; certified questions") as the basis for this Court's jurisdiction over his Petition. That statute describes the methods by which this Court may review federal appellate cases. Since this matter involves a decision of state law by the Supreme Court of New Jersey, the question of jurisdiction is properly viewed through the requirements of 28 *U.S.C.* § 1257

("State courts; certiorari"). As this Court has continually recognized, its jurisdiction over decisions of state courts has been limited by Congress to include only those cases involving a question of federal law *and* a final judgment by a state's highest court. *See, e.g., Jefferson v. City of Tarrant*, 522 U.S. 75, 80-81 (1997) (noting both that "Congress has vested in this Court authority to review federal question decisions made by state courts[]" and that "Congress has limited that power to cases in which the State's judgment is final."). Finality—which is not present in this case—will be discussed further below. The more immediate flaw in the instant Petition is the lack of a federal question. Pursuant to 28 *U.S.C.* § 1257, this Court may review only final judgments of a state's highest court:

> where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The instant Petition evokes none of these criteria. As noted, this case involves the application of New Jersey's common law fair report privilege. Thus, on the most basic level, this case does not involve a state statute "repugnant to the Constitution, treaties, or laws of the United States" and does not meet the jurisdictional mandate of 28 *U.S.C.* § 1257.

Petitioner's attempts to paint this matter as involving a federal question are unpersuasive. To the extent Petitioner attempts to fashion the fair report issue as an "overwhelming" area of national divide, he is misguided. All of the decisions cited by Petitioner claiming a purported "conflict" requiring resolution of this Court are state or federal cases deciding state common law defamation; this Court has never determined the fair report privilege to be a federal issue. Petition ("Pet.") at 17-19. As Judge Sack succinctly noted in his defamation treatise: "The constitutional status of the fair report privilege is uncertain; the Supreme Court has not treated the matter directly." Robert D. Sack, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS § 7:3.5[B][8] (4th ed. 2010) (footnote omitted). Thus, without any constitutional or federal statutory issue, this matter does not properly fall within this Court's jurisdiction.

Nor does Petitioner's invocation of this Court's jurisprudence regarding application of the actual malice doctrine as a "conditional" check on defamatory publication transform his arguments into a federal question. As explained above, Petitioner confuses the "conditional privilege" imposed by the actual malice standard, as set forth in *New York Times*, *supra*, 376 U.S. 254, with the "conditional privilege" of a fair report, which in some states means that actual malice can overcome a fair report. Pet. at 26, 30. Here, the Supreme Court of New Jersey ended years of conflicting rulings within the State regarding whether actual malice could defeat the State's fair report privilege. Pet. App. at 38a, 40a-41a. The court ruled that once the report is determined by a court to be full, fair, and accurate, "the

privilege becomes absolute and cannot be defeated." Pet. App. at 40a-41a. Petitioner essentially argues that by creating an "absolute" state common law privilege, as exists in many states, the Supreme Court of New Jersey violated this Court's precedents and undercut reputational protections for *plaintiffs*, which he purports are provided by the actual malice standard.[1] Pet. at 30.

Thus, in a fanciful attempt to turn state common law defamation on its head, Petitioner urges this Court to "strike a proper balance of preserving individual reputation with freedom of speech and the press" (Pet. at 20) by federalizing *and limiting* the common law fair report privilege. Not only does this assertion belie the rationale behind the actual malice standard, which is designed to provide *more* breathing room for speech on matters of public concern through a higher standard of proof for libel plaintiffs, but it also completely undermines the rationale for the fair report privilege, without which it would be practically impossible for the media to cover public events, particularly court activities, which are naturally imbued with defamatory allegations.

1. Petitioner – who argues strenuously against the actual malice standard applying to him – nevertheless creates out of whole cloth the baseless notion that this Court's actual malice standard extends to the state common law privilege *in reverse*, by reducing protections for the media in a sort of "good for the goose, good for the gander," parity. Pet. at 25-26, 30. This nonsensical interpretation of the law ignores this Court's holding in *Gertz*, *supra*, 418 U.S. at 345-46, permitting states to "retain *substantial latitude* in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." (emphasis added).

Petitioner illustrates his folly by pointing to a series of cases decided by this Court, such as *Herbert v. Lando*, 441 U.S. 152 (1979), which declined to provide a *First Amendment* absolute privilege for media libel defendants against inquiry into editorial processes. Pet. at 28-30. Petitioner suggests that language in the *Herbert* opinion rejecting an "absolute First Amendment privilege" against inquiry into editorial processes somehow translates to a flat prohibition against any "absolute" privilege in defamation cases, even common law privileges such as fair report (and by extension, the litigation privilege). Pet. at 29-30. This theory is a confused misreading of defamation law, particularly *Herbert*, where the media defendant sought to expand the *First Amendment* to shield against compelled testimony of editorial processes so as not to chill freedom of the press. While the *Herbert* Court held against such an expansion of the *First Amendment* in that context, this Court has never opined that such protections cannot exist within the confines of state statutes or common law. Indeed, that same protection unsuccessfully sought by the media in *Herbert* has existed under New Jersey common law for media defendants since shortly after *Herbert* was decided, under the Supreme Court of New Jersey's interpretation of the New Jersey Newsperson's Privilege *N.J.S.A.* 2A:84A-21 *et seq.* *Maressa v. New Jersey Monthly*, 89 N.J. 176, 189 (1982).

That this Court has encouraged States in *Gertz* to fashion their own defamation law with certain minimal safeguards, and has never rendered a decision regarding the fair report privilege, underscores that this Court has reserved the fair report privilege as an issue

for the States. *Gertz*, *supra*, 418 U.S. at 347. Petitioner acknowledges this in a roundabout way when he concedes that the United States Supreme Court cases he cites do no more than "demonstrate compelling evidence that imply the fair report privilege should only command protection as a conditional privilege and will always be defeated by a showing of actual malice." Pet. at 30. In fact, as explained above, these cases do nothing of the sort.

Petitioner further unsuccessfully attempts to twist his argument into a federal question by insinuating that the New Jersey courts *created* an issue of federal law by mistakenly interpreting how the term "fraudulent transfer" is defined by federal courts and statutes. The New Jersey courts below ruled that a fair report existed because allegations made against Petitioner by the Trustee involving fraudulent transfer, common law conversion, misappropriation, and unjust enrichment, carry the same "gist" or "sting" as references in headlines and in the body of the news reports at issue, such as "Man accused of stealing $500,000 for high living," and "Argyle residence allegedly bought with stolen funds." While this determination—including how much reliance should be placed on court interpretations of the statute—is clearly a matter of state common law, Petitioner claims that based on federal decisions that narrowly define the bankruptcy law violation of "fraudulent transfer," 11 *U.S.C.* § 548, the courts below should have required Respondents to characterize the Trustee's allegations against Petitioner only according to the exact definitions propounded by a federal court. Pet. at 36.

Petitioner's theory of the law would eviscerate any notion of substantial accuracy, which is a hallmark not only of the fair report privilege but also of determining whether a statement is capable of a defamatory meaning. Neither this, nor any other court, has ever placed such an onerous burden on the news media. *See, e.g.*, *Costello v. Ocean County Observer*, 136 N.J. 594, 619 (1994) (noting "we realize that journalists are not lawyers by trade. Errors in reports on court proceedings are bound to occur from time to time, and the *First Amendment* protects those errors as long as they are not recklessly or intentionally made."); *Ricci v. Venture Magazine, Inc.*, 574 F. Supp. 1563, 1568 (D. Mass. 1983) ("courts hearing defamation claims are to apply a common sense standard of expected lay interpretation of media reports of trials, rather than inquiring whether a report was strictly correct in defining legal charges and describing legal rulings.").

Additionally, Petitioner's acknowledgment that "[a]lthough the [Supreme Court of New Jersey] majority correctly observed the [fair report] privilege[']s legal requirements [ ] it failed to faithfully apply said principles to the matter at hand[,]" Pet. at 30, is yet another sure sign that this Petition seeks review of an issue this Court rarely entertains. *See Sup. Ct. R.* 10 ("A petition for a writ of Certiorari is rarely granted when the asserted error consists of erroneous *factual* findings or the misapplication of a properly stated rule of law."). Even if the Supreme Court of New Jersey decision was erroneous, which it was not, it is not the type of error reviewed by this Court.

II. The Instant Matter Involves An Interlocutory Decision.

This Court has recognized that its jurisdiction over decisions of the state courts is limited by the "firm final judgment rule[]" of 28 *U.S.C.* § 1257. *Jefferson*, *supra*, 522 U.S. at 81. Before a state court judgment may be reviewed, it "must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Id.* (quoting *Market St. R.R. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945)). In short, the judgment "must be the final word of a final court." *Jefferson*, *supra*, 522 U.S. at 81 (quoting *Market St. R.R. Co.*, *supra*, 324 U.S. at 551). The instant matter is far from "the final word of a final court."

Indeed, the Supreme Court of New Jersey essentially affirmed the appellate court's ruling that, with respect to the remaining claim regarding Charity Snack, the case must be remanded to the trial court due to the "paucity of the record" below, and directed that the Law Division should "apply the standard set out in *Senna* [*v. Florimont*, 196 N.J. 469 (2008)] and may address any other issues raised by either party specific to the Charity Snack claim." Pet. App. at 45a-46a. Further proceedings, including an answer, discovery, motion practice and potentially a trial, will occur in this case (and a case management conference was held with the trial judge on December 3, 2010 to discuss scheduling of these proceedings); as such, the judgment of the Supreme Court of New Jersey was not

final, and this Court should respectfully deny the Petition. *Jefferson*, *supra*, 522 U.S. at 81 (holding that case was outside the Court's jurisdiction and noting particularly that "[a]bsent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims.").

Finally, while this Court has recognized four exceptions to the final judgment rule, which exceptions allow review notwithstanding a remand and future proceedings in state court, the instant matter does not fall within one of those very narrow categories – each requiring the involvement of a federal issue, which, as explained above, does not exist here. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 479-83 (1975); *see also Johnson v. California*, 541 U.S. 428, 430-32 (2004) (citing *Cox Broadcasting* for descriptions of the narrow categories and ultimately determining that the Court lacked jurisdiction). Thus, this Petition simply cannot – and does not - involve a situation (1) where there will be further proceedings, even a trial, but "for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained"; (2) where the federal issue "finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings"; (3) where if Salzano "ultimately prevails on the merits, the federal issue will be mooted" but if he were to lose, "the governing state law would not permit him again to present his federal claims for review." *Cox Broad. Corp.*, *supra*, 420 U.S. 479-81. Nor, finally is this a situation where, (4):

> [T]he federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-83.

In short, the case being appealed from is a state court decision on a matter of state law, in a case that is now the subject of ongoing proceedings. It is not properly within the jurisdiction of this Court and as such, the Petition must, respectfully, be denied.

CONCLUSION

Petitioner has failed to provide a jurisdictional basis or compelling reason for this Court to grant the Petition for Certiorari. Respondents, therefore, respectfully request that the Petition be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 10-616

In the Supreme Court of the United States

THOMAS JOHN SALZANO
Petitioner,

v.

NORTH JERSEY MEDIA GROUP INC, d/b/a THE RECORD, NORTHJERSEY.COM, MALCOLM BORG, STEPHEN A. BORG, MARTHA MCKAY, and JONATHAN MARKEY
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

REPLY BRIEF

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REPLY BRIEF FOR *PRO SE* PETITIONER[1]

Introduction

Respondents brief in opposition ("Resp. Opp.") illustrates that there is substantial confusion about the critically important First Amendment issues that *pro se* petitioner raised, and thus that there is a compelling need for clarification and unification on these issues from this Court. It cannot be denied that the courts are deeply and intractably divided on whether or not a clear showing of actual malice will overcome invocation of the fair report *privilege* protection in a defamation case. Indeed, respondents have utterly failed to introduce any plausible explanations why a *privilege* such as fair report outweighs a private plaintiff's ability to vindicate his name and seek damages if a publisher or media outlet can be found to clearly have made defamatory comments regarding said individual with actual malice or with reckless disregard of the truth. In this regard it becomes clear that the Second Restatement of Torts Section 611 Comment(s) (a) & (b), relied on by the court below, are plainly unconstitutional and antithetical to this Court's actual malice jurisprudence. There is similar disparity as to whether the initial pleadings exception recognized in the Second Restatement of Torts

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[1] *Pro se* petitioner ("I, me, myself") is twenty eight years old and not an attorney at law and has received no legal advice or assistance in formulating the instant response. All case law(s), statute(s) and or citation(s) herein were researched solely by me. Therefore, I ask this High Court to continue to review my *pro se* response broadly and liberally.

Section 611 Comment (e) and adopted by a large number of courts overcomes the fair report privilege defense and when not recognized, whether a procedural due process violation may occur.

Moreover, respondents cannot deny that the issues raised in my petition are of great national importance in which resolution by this Court is warranted. Indeed their perfunctory opposition acknowledge the issues importance which is further confirmed by the 19 amicus curiae who played a pivotal role in joining in the argument below, including the New York Times, Wall Street Journal, ABC, Inc., NBC, Inc., to name a few. Respondents also make no effort to rebut the fact that the questions presented were all definitively ruled on by the courts below or that I *can* clearly and convincingly show the instant defamatory articles were made with actual malice due to the undisputed and quite telling facts I introduced (without the aid of discovery) on the record below. Thus, this case presents the appropriate vehicle through which this Court can rule on the issues.

And lastly, when the fair report privilege's fairness and accuracy analysis or "gist" test was applied in this case, the New Jersey Supreme Court was decisively split 3-3 on the issue, garnering no majority vote. Because of this equally divided, deadlocked 3-3 vote which occasioned a spirited joint dissent, respondents essentially escaped liability only as a result of a procedural technicality in which the court below upheld

the findings of the intermediate court which *would have* held the complained of articles were fair and accurate[2].

In sum, respondents' opposition to the instant petition rests in large part on flawed procedural grounds as they skirt the substantive issues. Further, their effort to divert attention from the holding below is a telling concession that said decision cannot be defended. Thus, there can be no more accurate an illustration of the need for this Court's intervention in this matter as I have carried my burden of demonstrating compelling reasons for my petition to be granted and I respectfully submit that certiorari should be granted.

I. Respondents Attempt to Avoid Review Lacks Merit and the Refusal to Defend the Merits of the Decision Below Confirms that Court's Error

Respondents do not even pretend to defend the decision below based on its finding that actual malice cannot overcome the fair report privilege once a defamatory report is *allegedly* determined to be fair and accurate. That is because there is nothing in the decisions of this Court that would imply or suggest the

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[2] In actuality, the intermediate court *did not* base its holding on fair report privilege grounds because that court *stripped* respondents of fair report privilege protection altogether citing the Restatement (Second) of Torts Section 611 Comment e. (The New Jersey Supreme Court later reversed this aspect of the appellate division's decision.) Thus, the appellate division's finding of "fairness and accuracy" was purely hypothetical and amounted to nothing more than an exercise in discretion and in the end would have been erroneous.

narrow scope in which this Court spoke regarding knowingly false speech. This Court has resoundingly rejected any notion that speech uttered with proof of actual malice is ever protected by the First Amendment. See *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) ("[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any **except the knowing or reckless falsehood.**"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (plurality) ("[c]alculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech,"); *Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967) ("[b]ut the constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function"); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) ("[f]alse statements of fact are particularly valueless" and should be penalized under defamation law when the "statement was made with knowledge that it was false or with reckless disregard of whether it was false or not."); *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 63 (1966) ("the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth").

Thus, instead of grappling with an otherwise indefensible finding below, respondents attempt to raise opposition based on jurisdiction. Respondents assert that whether actual malice defeats the fair report privilege, "[c]learly fall[s] within this Court's holding in

Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974), that States are free to make their own standards regarding libel law..." See Resp. Opp. at 3; Also see Resp. Opp at 12 ("[t]his Court has encouraged States in *Gertz* to fashion their own defamation law with certain minimal safeguards."). While technically correct, it misses the point in the instant matter and is thus misleading. Although this Court in *Gertz* permitted States to "retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual," 418 U.S. at 345-46, that decision was based on this Court's desire to make recovery *less* onerous and *more* flexible to private plaintiffs[3] who could not meet the demanding actual malice standard. *Gertz* never permitted the States to categorically deny a plaintiff a chance at recovery when actual malice can be definitively proven by him to defeat a reporting *privilege*, even if a defamatory report is "allegedly" fair and accurate or *eliminate* media liability when analysis under the fair report privilege is deadlocked by a court.

By sweeping the substantive issues raised aside through their misperceived procedural argument, respondents are seeking to have this Court find acceptable that even if one knows what one is

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[3] Although I am a private individual and *should* be held under the negligence standard, I am able to clearly make a showing that respondents acted out of actual malice. Thus, a defamation plaintiff in my situation *should be* permitted to go forward with claims *regardless* of a privilege.

publishing is false, one can still escape liability under the fair report privilege once it is determined that the *knowing falsehood* was *fairly and accurately recited*. Such a proposition directly refutes this Court's repeated command that knowingly false statements of fact are never protected under the First Amendment. *See* previous citations p. 4. Likewise, there are no countervailing benefits or legitimate interest of the public in being informed of knowingly false information. Plainly, when a plaintiff has clear proof of actual malice, this cannot be overlooked nor outweighed by a media "privilege." Yet, this is what precisely occurred in this case, and which is gradually occurring nationwide and the decision below only exacerbates an imbalanced rule forbidding any injured individual to recover defamation damages even if the defendant definitively knew said information was false, so long as it was fairly and accurately attributed to any *unproven* (and in this case false) defamatory paper filed in court. It gives the green light to proliferate yellow journalism.

Respondents further contention that this Court lacks jurisdiction to review the instant matter because "[t]his Court has never determined the fair report privilege to be a federal issue..." Resp. Opp at 10, does not by any means suggest a federal or constitutional issue ceases to exist. Moreover, and to the contrary of respondents belief, this Court *has* determined issues of defamatory statements fairness and accuracy in the disposition of the case *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), even if not

specifically termed as analysis under the "fair report" privilege. *Bresler* involved a newspaper report of a community meeting concerning local government matters, in which Bresler was repeatedly accused by opposing members as engaging in "blackmail" with his negotiations with city officials. See *Id* at 13. Although the use of the world 'blackmail' *truthfully* occurred and the newspapers reported such occurrence, Bresler believed that the newspapers should be held liable for defamation because "blackmail" is a criminal act and the reporters knew he had not committed the crime of blackmail. This Court held differently.

> "The Greenbelt News Review was performing its wholly legitimate function as a community newspaper when it published **full** reports of these public debates in its news columns. **If the reports had been truncated or distorted in such a way as to extract the word 'blackmail' from the context in which it was used at the public meetings,** this would be a different case. **But the reports were accurate and full**...Bresler's proposal was **accurately and fully described in each article**...
>
> **********
>
> No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words

> were charging Bresler with the commission of a criminal offense... [t]he record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime."

Bresler, 398 U.S. at 13-14. See also *Wolston v. Reader Digest Association, Inc.*, 443 U.S. 157, 169 (1979) ("The public interest in accurate reports of judicial proceedings is substantially protected by *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975). As to inaccurate and defamatory reports of facts, matters deserving no First Amendment protection . . . , we think *Gertz* provides an adequate safeguard for the constitutionally protected interests of the press and affords it a tolerable margin for error by requiring some type of fault.")

In the instant case the word "stealing" was used *without* qualification to report an alleged "fraudulent transfer" allegation under Title 11 of the Bankruptcy Code Section 548. Indeed, this word was nowhere in the complaint and could not be implied or inferred from the complaint. This was confirmed by the prolific dissent of three Justices below in deadlock with the other three Justices, who unequivocally determined that a fair reading of Adversary Proceeding 06-01403 ("A.P. 06-01403") as compared to the "news articles" were neither fair nor accurate:

> "This news story has all of the elements that cry out for this Court to pull aside the cloak of privilege, for it misleads by innuendo, insinuates criminal prosecutions are afoot, and implies distortion. It does not qualify as a news report that is full, fair and accurate."

See Petitioner's Appendix ("App.") 59a. The dissent further found:

> "[t]he 'sting' of the word choice [stealing] is far harsher than the truth, and that choosing that value-laden word...created a news report that was both unfair and inaccurate... [the word] **'steal' carries with it the clear connotation of a crime, together with its attendant evil-minded mens rea. None of that is faithful to the actual allegations made in the Bankruptcy Court by the Trustee.**"

See App 55a-56a. Despite these undisputed facts and such strong condemnation by the dissent, the three plurality inexplicably affirmed the "hypothetical" portion of the intermediate court's decision.

Equally unavailing is respondents assertion that by allowing a plaintiff to show actual malice and overcome the fair report privilege, this somehow "[u]ndermines the rationale for the fair report privilege, without which

it would be practically impossible for the media to cover public events..." Resp. Opp. at 11. However that contention is illogical and unpersuasive and this Court dispelled a similar protestation raised in *Herbert v. Lando*, 441 U.S. 153 (1979) which deserves no less application in the present matter:

> "Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation...**If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more that what our cases contemplate and does not abridge either freedom of speech or of the press**... Only knowing or reckless error will be discouraged; and unless there is to be an absolute First Amendment privilege to inflict injury by knowing or reckless conduct...constitutional values will not be threatened."

See *Lando*, 441 U.S., 172-173. Clearly, the fair report privilege is intended to provide media protection in reporting possibly erroneous information or false

statements, *not outright knowingly false statements* made in reckless disregard of the truth. Thus, just as *New York Times v. Sullivan*, 376 U.S. 254 (1964) provided a constitutional privilege designed to counter the effect of criticism of official conduct and deter protected speech, this Court should engraft a similar federal rule that speech uttered with actual malice *always* exceeds constitutional protections and thus defeats any claimed "privilege." This would remain entirely consistent with this Court's long recognition that:

> "[t]he individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty...[and which] does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.'"

Dun Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 757-758 (1985); *Gertz* at 341 citing *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart concurring opinion). States that are unwilling to allow plaintiffs the opportunity to prove actual malice, "an extremely powerful antidote to the inducement to media self-censorship," *Gertz* at 342, carries a serious injustice and "substantial abridgment of the state law right to compensation for wrongful hurt to one's reputation." *Id*

at 343. This is especially true with regards to private individuals in which this Court has recognized the State has a "correspondingly greater" interest in allowing recovery. *Id* at 344. See also *Gertz v. Robert Welch, Inc.*, 680 F. 2d 527, 535, 539-540 (7th Cir., 1982) (affirming trial court's disallowing Welch of conditional privilege "to report on public proceedings in which defamatory statements have been made about private individuals" because "[t]he evidence...supports the jury's finding of actual malice. To the extent that the conditional privilege for reports of government proceedings attaches to this case, it was overcome by a showing of abuse of the privilege. The evidence of actual malice subsumes a breach of duty which satisfies the negligence standard applicable to the bulk of the defamatory statements made in the article.")

Respondents also take serious issue with my citing *Herbert v. Lando, supra.*, as demonstrating this Court's rejection of a First Amendment absolute privilege for media libel defendants. In respondents view, this Court's resolution of that case must be strictly confined to the context of editorial process alone and "a flat prohibition against any 'absolute' privilege in defamation cases, even common law privileges such as fair report" is not what this Court intended. Resp. Opp. at 12. Respondents' constricted interpretation of the *Lando* decision is incorrect in light of this Court's various pronouncements in differing contexts that the press only commands a conditional privilege in reporting and not an absolute:

> "If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation...Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation."

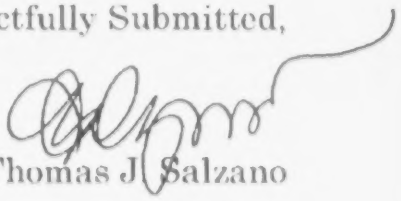
Gertz, 323 U.S. at 341 (internal citations omitted) (emphasis added). And this has been the long-standing view of this Court. See *New York Times Co.*, 376 U.S. at 293 (Black, J., concurring); *Garrison v. State of Louisiana*, 379 U.S. at 80 (Douglas, J., concurring); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967) (opinion of Black, J.). That respondents' sense the need to minimize and justify the differences in application of conditional privileges by this Court in some circumstances but not others suggests an understandable intellectual discomfort with how the court below ruled. It also verifies the vast disparity and cloud of uncertainty from jurisdiction to jurisdiction that exists on this issue of clear constitutional significance which this Court should affirmatively rule on.

CONCLUSION

Even if "this Petition seeks review of an issue this Court rarely entertains" Resp. Opp. at 14, this case presents all the more compelling reasons why this Court should intervene: the overwhelming divide on the issues

from jurisdiction to jurisdiction, the undeniable level of national importance said issue raises as attested by the 19 amicus curiae who intervened and participated below, in addition to the clearly erroneous holding of the 3 justice plurality. And the clear and unwavering conviction of the 3 dissenting justices only magnifies the serious injustice that has befallen me. The grant of certiorari is warranted.

Respectfully Submitted,



Thomas J. Salzano

Dated: January 14, 2011

Pro Se Petitioner